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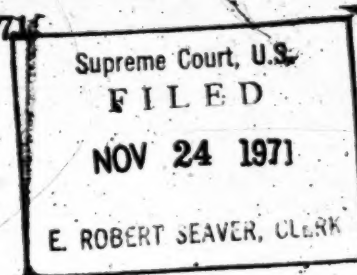
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SUPREME COURT, U. S.

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99



**EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, ET AL,**

Petitioners,

—vs.—

DELTA AIRLINES, INC., ET AL,

Respondents

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA**

**Petition for Certiorari Filed March 19, 1971
Certiorari Granted October 12, 1971**

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APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99

EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, KENNETH C. KENT,
ELMO HOLDER, ROBERT M. LEICH, IAN F.
LOCKHART, CLIFFORD K. ARDEN, JAMES A.
GEYER and PAUL E. HATFIELD, on behalf of
himself and all other persons similarly situated,

Petitioners,

—vs.—

DELTA AIRLINES, INC., EASTERN AIRLINES,
ALLEGHENY AIRLINES, INC., and WILLIAM
F. WOOD, on behalf of himself and all other
persons similarly situated,

Respondents

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA**

**Petition for Certiorari Filed March 19, 1971
Certiorari Granted October 12, 1971**

RELEVANT DOCKET ENTRIES

In the Vanderburgh Superior Court

- 6-28-68 Plaintiffs file verified complaint for restraining order and temporary injunction and permanent injunction. Plaintiffs file bond of \$7,500.00 and temporary restraining order issued.
- 1-16-69 Plaintiffs file request for special findings of fact and conclusions of law.
- 1-16-69 William F. Wood files verified petition to intervene.
- 1-17-69 Hearing on petition for temporary restraining order and injunction.
- 1-17-69 Court grants petition of William F. Wood to intervene. Court grants defendants right to file petition to intervene on behalf of other parties. Parties file stipulations of fact. On motion, Allegheny Airlines is substituted for plaintiff Lake Central.
- 1-22-69 Paul E. Hatfield files petition to intervene as party defendant which petition is granted.
- 1-30-69 Defendants present proposed findings of fact and conclusions of law.
- 1-31-69 William F. Wood, on behalf of himself and others similarly situated, files his intervening complaint.
- 1-31-69 Plaintiffs present proposed findings of fact and conclusions of law.
- 2-21-69 Court renders special findings of fact and conclusions of law for plaintiff. Judgment of temporary injunction on said special findings and conclusions of law.
- 3-24-69 Defendant Evansville-Vanderburgh Airport

Authority District files Counterclaim against plaintiffs.

- 3-24-69 Defendants file answers in four paragraphs to intervening complaint of William F. Wood. Defendants file answers in four paragraphs to plaintiffs' complaint.
- 4-16-69 Plaintiffs' demurrer to defendants' Counterclaim sustained.
- 4-17-69 Plaintiffs file motion for summary judgment.
- 5-1-69 Defendants file motion for summary judgment.
- 5-8-69 Motion of plaintiffs and intervening plaintiff for summary judgment is granted. Cross motion of defendants and intervening defendant for summary judgment is overruled. Final judgment for plaintiffs perpetually enjoining defendants.
- 5-14-69 Defendants file praecipe for transcript of entire record.

In the Supreme Court of Indiana

- 8-5-69 Transcript and assignment of errors submitted under rule 2-14.
- 12-2-69 Appellants file brief.
- 3-5-70 Appellees file brief.
- 5-4-70 Appellants file reply brief.
- 12-23-70 1970 Term. Judgment affirmed. De Bruler, J., Hunter, C. J., Arterburn, Given and Jackson, J. J., concur.
- 2-10-71 Appellants file request to Clerk to certify

and transmit entire record. Notice of petition for certiorari to the Supreme Court of the United States. Appellants petition to transfer record to the Supreme Court granted. Arterburn, C. J.

In the Supreme Court of the United States

- 3-19-71 Petition for Writ of Certiorari to the Supreme Court of Indiana filed.
- 10-12-71 Certiorari granted.

PLAINTIFFS' COMPLAINT

(R. 412)

**Vanderburgh Superior Court
Vanderburgh County, Indiana**

Cause No. SC 68328

STATE OF INDIANA)

COUNTY OF VANDERBURGH)

SS:

IN THE SUPERIOR COURT OF VANDERBURGH
COUNTY

1968 TERM

DELTA AIR LINES, INC.)
EASTERN AIR LINES, INC.)
LAKE CENTRAL AIRLINES,)
INC.)

Plaintiffs)

vs.

NO. SC-68-328)

EVANSVILLE-VANDERBURGH)
AIRPORT AUTHORITY DIS-)
TRICT, KENNETH C. KENT,)
ELMO HOLDER, ROBERT M.)
LEICH, IAN F. LOCKHART,)
CLIFFORD K. ARDEN, and)
JAMES A. GEYER,)

Defendants)

COMPLAINT FOR RESTRAINING ORDER,
TEMPORARY INJUNCTION, AND
PERMANENT INJUNCTION

PARAGRAPH 1

Plaintiffs DELTA AIR LINES, INC., EASTERN
AIRLINES, and LAKE CENTRAL AIRLINES, INC.,
hereinafter sometimes referred to as "plaintiff Air-
lines," for their first cause of action allege and say:

1. Plaintiff DELTA AIR LINES, INC. is a corpora-
tion organized under the laws of the State of Louisi-

ana and is a foreign corporation duly authorized to transact business in the State of Indiana.

2. Plaintiff EASTERN AIRLINES is a corporation organized under the laws of the State of Delaware and is a foreign corporation duly authorized to transact business in the State of Indiana.

3. Plaintiff LAKE CENTRAL AIRLINES, INC., a corporation organized under the laws of the State of Delaware having its principal place of business in the State of Indiana and is duly authorized to transact business in the State of Indiana.

4. The defendant EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT is the owner and operator of Dress Memorial Airport in Vanderburgh County, State of Indiana, deriving its authority and power solely by statute, said statute being Burns' Ind. Ann. Stats. (1964 Repl.), Sections 14-1201 through 14-1235, said defendant EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT being expressly empowered by statute to sue and be sued in its own name, said statute being Burns' Ind. Stats. (1964 Repl.), Section 14-1215(1).

5. The defendant KENNETH C. KENT is a member and President of the Board of Directors of the EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT.

6. The defendant ELMO HOLDER is a member and Vice-President of the Board of Directors of the EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT.

7. The defendant ROBERT M. LEICH is a member and Secretary of the Board of Directors of the EV-

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT.

8. The defendant IAN F. LOCKHART is a member of the Board of Directors of the EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT.

9. The defendant CLIFFORD K. ARDEN is a member of the Board of Directors of the EVANSVILLE VANDERBURGH AIRPORT AUTHORITY DISTRICT.

10. The defendant JAMES A. GEYER is the Airport Manager of Dress Memorial Airport and is the Treasurer of the EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT.

11. Each of the plaintiff Airlines is a commercial air carrier transporting passengers and commodities in interstate commerce by virtue of authority granted to them by the Civil Aeronautics Board pursuant to the provisions of 49 U.S.C. Section 1371; plaintiff Airlines are authorized to serve the public in interstate commerce between Dress Memorial Airport and various other locations within and without the State of Indiana.

12. Each of the plaintiff Airlines herein, pursuant to lease agreements with the EVANSVILLE VANDERBURGH AIRPORT AUTHORITY DISTRICT, operates facilities at Dress Memorial Airport for the purpose of providing commercial air service, said facilities including air passenger ticket counters, offices, storage space and other facilities.

13. DELTA AIR LINES, INC., operates nine (9) regularly scheduled flights daily from Dress Memorial Airport, of which three (3) flights are direct flights

to locations beyond the State of Indiana. Five (5) flights terminate at locations beyond the State of Indiana. One (1) flight terminates solely within the State of Indiana.

14. EASTERN AIRLINES operates six (6) regularly scheduled flights daily from Dress Memorial Airport, all of which are direct flights to locations beyond the State of Indiana. During the twelve (12) months preceding June 30, 1967, EASTERN AIRLINES carried 46,029 passengers enplaning at Dress Memorial Airport, all of whom were carried to destinations beyond the State of Indiana.

15. LAKE CENTRAL AIRLINES, INC., operates two (2) regularly scheduled flights daily from Dress Memorial Airport, both of which are direct flights to locations beyond the State of Indiana. During the twelve (12) months preceding June 30, 1967, LAKE CENTRAL AIRLINES, INC., carried 13,578 passengers enplaning at Dress Memorial Airport all of whom were carried to destinations beyond the State of Indiana.

16. During the twelve (12) months preceding June 30, 1967, a total of 128,396 persons departed from Dress Memorial Airport upon scheduled and non-scheduled commercial air carriers.

17. Enplaning air passengers constitute a minority of the users of Dress Memorial Airport. In 1967 there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights. In 1967, in addition to some 14,834 takeoffs and landings by commercial air carriers, there were 84,598 takeoffs and landings by other civil aircraft, both local and itinerant, each resulting in the use of the airport facilities by one

or more persons. There are also other users of the airport facilities, such as persons visiting the bar and restaurant, persons using the freight facilities, observers and others, all hereinafter more fully specified.

18. On February 28, 1968, the Board of Directors of the **EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT** enacted an ordinance known as Ordinance Number 33 which levies a charge of \$1.00 on every enplaning commercial air passenger at Dress Memorial Airport and directs the plaintiff Airlines, as vendors of air line tickets, to collect said charge for the **EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT**, a copy of said ordinance being attached hereto, made a part hereof, and marked "Exhibit A."

19. Said Ordinance Number 33 is to take effect on July 1, 1968.

20. Said Ordinance Number 33 will require all air line passengers departing Dress Memorial Airport to pay a charge of \$1.00 as a condition for the right to go aboard (enplane upon) plaintiff Airlines' aircraft, plaintiff Airlines being directed by the terms of said ordinance, to collect said charge of \$1.00 and impliedly being directed to refuse to permit any air line passenger to board their aircraft unless said charge has been paid, Section 1 of said ordinance imposing the charge of \$1.00 upon every enplaning air passenger and Section 2 imposing upon all air lines, their agents and employees, the responsibility of collecting said charge.

21. Said charge of \$1.00 is purportedly imposed as a fee for the use of airport facilities, but said charge is, in fact, not imposed upon a majority of the users of the airport facilities, to-wit

- a. persons using the airport facilities after arrival at said airport upon commercial aircraft;
- b. persons using the airport facilities upon arrival to or departure from Dress Memorial Airport by means of non-commercial aircraft;
- c. persons and corporations using the airport facilities to transport and receive air freight shipments;
- d. persons using the airport facilities when meeting or seeing-off air line passengers;
- e. persons using the airport facilities for entertainment purposes in observing the arrival and departure of aircraft;
- f. persons using the airport facilities incidental to the use of dining and bar facilities and other facilities located at said airport; and
- g. other persons making use of the airport facilities who are not departing from said airport.

22. The only method by which the plaintiff Airlines can be assured that every person boarding one of their aircraft at Dress Memorial Airport pays said charge is to publish said charge as part of their tariffs and rates for departure from Dress Memorial Airport, many air line tickets for departures from Dress Memorial Airport being written by out-of-state travel agencies, private persons and corporations authorized to write their own ticket, and by other commercial air lines who are authorized to write tickets upon plaintiff Airlines.

23. Said charge of \$1.00 imposed by Ordinance Number 33 will additionally be required to be collected from air passengers enplaning at Dress Memorial Airport upon non-scheduled or charter air lines, said non-scheduled or charter air lines not being parties hereto

but believed by plaintiff Airlines to be interested in the disposition of this lawsuit.

24. Plaintiff Airlines, as vendors of air line tickets in Vanderburgh County, Indiana, will be required to collect directly from all passengers departing or enplaning from Dress Memorial Airport said charge of \$1.00 irrespective of the fact that a vast majority of said passengers will be traveling in interstate commerce to destinations beyond the State of Indiana and without consideration of the actual facilities and services furnished to said passengers at Dress Memorial Airport by the EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT.

25. Said Ordinance Number 33 will impose an undue and unreasonable burden upon the commerce among the several states and is in direct violation of Article 1, Section 8, Clause 3, of the Constitution of the United States (Commerce Clause), in that:

- a. Said ordinance is applied arbitrarily and unreasonably upon passengers traveling in interstate commerce without reference to the reasonable value of the services and facilities purportedly furnished said passengers, said charge being, in reality, a head tax imposed upon said interstate air line passengers as a condition of their departure from the State of Indiana and from Vanderburgh County in that State via the Dress Memorial Airport.
- b. Said ordinance, by its application solely to a single class of users of said airport, which class consists primarily of passengers traveling in interstate commerce, creates an undue and unreasonable burden upon interstate commerce.

26. Said Ordinance Number 33 will impose an undue and unreasonable burden upon the commerce among the several states in direct violation of Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), will deprive plaintiff Airlines of the equal protection of the laws in direct violation of Amendment Fourteen to the Constitution of the United States and will deprive plaintiff Airlines of property without due process of law in violation of Amendment Fourteen to the Constitution of the United States, in that passengers will be deterred from traveling in interstate commerce from said airport. The imposition of said illegal and unconstitutional charge will penalize passengers seeking to depart Evansville and the State of Indiana by air, will induce passengers entirely to forego travel between the States, or to travel by commercial aircraft from other airports, or to travel by means of conveyance other than commercial aircraft, all to the diminution and impairment of interstate commerce and of plaintiff Airlines' businesses as carriers of passengers in interstate commerce.

27. The collection of said illegal and unconstitutional charges, as required by said Ordinance Number 33, will cause plaintiff Airlines to suffer great expense and inconvenience, resulting in serious impairment of plaintiff Airlines' businesses, by reason of which plaintiff Airlines will be deprived of property without due process of law in violation of Amendment Fourteen to the Constitution of the United States.

28. By reason of said unconstitutionality, the collection of said charges by plaintiff Airlines under said ordinance will expose plaintiff Airlines to liability and multiple lawsuits brought against plaintiffs for relief from the unconstitutional imposition of said charge

and for reimbursement thereof by interstate passengers compelled by plaintiff Airlines to pay said charge.

29. The failure of or refusal by plaintiff Airlines to collect the unconstitutional charge imposed by said ordinance will expose plaintiff Airlines, and their employees and agents, to criminal liability under the following provisions of the Indiana Statute creating the EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

30. That by reason of the foregoing, the plaintiff Airlines allege that enforcement of said Ordinance Number 33 will, if not enjoined, cause great injury and damage to plaintiffs and to plaintiff Airlines' interstate air line customers, for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

31. If plaintiff Airlines are required to enforce said ordinance and collect the charges imposed thereby beginning on July 1, 1968, the illegal and unconstitutional collection of said charges from air line passengers traveling in interstate commerce, or the refusal to collect said illegal charges, will, unless restrained without notice and enjoined by this Court, expose plaintiff Airlines and their employees and agents to immediate liability thereby causing substantial injury to plaintiffs,

their employees and agents, and to their commercial air line businesses, all in violation of plaintiff Airlines' rights for which they have no adequate remedy at law.

32. That the illegality of the conduct required of plaintiff Airlines under said ordinance and resulting exposure to plaintiff Airlines of great and irreparable injury is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary restraining order without notice to the defendants, or any of them, to preserve the status quo and to prevent immediate injury to plaintiff Airlines.

33. That plaintiff Airlines will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary restraining order or temporary injunction.

WHEREFORE, plaintiff Airlines pray as follows:

A. That an order be entered herein without notice by this Court restraining and enjoining until further order of this Court or until such time as a hearing on plaintiff Airlines' application for a temporary injunction may be had, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance Number 33 on its effective date of July 1, 1968, or at any time thereafter and from taking any steps to enforce the provisions of said ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that plaintiff Airlines, and their em-

ployees and agents, make any collection of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter, and from otherwise taking any action or causing any action to be taken against plaintiff Airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter.

3. Instituting or causing to be instituted any criminal proceedings against plaintiff Airlines, or their employees and agents, for the non-collection of the charges imposed by said Ordinance Number 33;
4. Otherwise taking any action, because of the non-collection of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the operation by plaintiff Airlines of their businesses in Vanderburgh County, Indiana;
5. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter; and from taking any action whatsoever because of the non-payment of said charges imposed by Ordinance Number 33, direct or indirect,

which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That a hearing on plaintiff Airlines' application for a temporary injunction be held on or before the 31st day of July, 1968, and after such hearing that a temporary injunction be issued granting the relief herein above prayed for.

C. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff Airlines' costs in such amount as the Court may determine.

D. That this Court enter an order declaring said Ordinance Number 33 to be unconstitutional under Article 1, Section 8, Clause 3 of the Constitution of the United States.

E. That the plaintiff Airlines have such further relief in the premises as may be just and equitable.

**DELTA AIR LINES, INC.
EASTERN AIRLINES
LAKE CENTRAL AIRLINES, INC.**

s / Fred P. Bamberger

Fred P. Bamberger

s / Jeffrey R. Kinney

Jeffrey R. Kinney

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Attorneys for Plaintiffs

PARAGRAPH II

Plaintiffs DELTA AIR LINES, INC., EASTERN AIRLINES, and LAKE CENTRAL AIRLINES, INC., hereinafter sometimes referred to as "plaintiff Airlines," for their second cause of action allege and say:

1. Plaintiff Airlines hereby adopt and reallege and incorporate by reference the allegations contained in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of Paragraph I of their complaint as if herein set out in full.
2. Said Ordinance Number 33 denies and restrains citizens of the United States from exercising their right and privilege to move unhampered, unimpeded, and without restriction or restraint to and through the various states of the United States and is in direct violation and contravention of the Privileges and Immunities, Equal Protection, and Due Process Clauses of Amendment Fourteen of the Constitution of the United States, said ordinance and charge imposed thereby being applied arbitrarily and discriminatorily upon interstate air line passengers thereby denying them their constitutional rights and privileges and immunities as aforesaid by compelling them to pay, as a condition for their departure from the State of Indiana via Dress Memorial Airport into interstate commerce, said charge which has no reasonable basis in fact to the services and facilities purportedly furnished

said passengers, said charge being, in reality, a head tax imposed upon said interstate air line passengers as a condition for their departure from the State of Indiana via Dress Memorial Airport.

3. By reason of said unconstitutionality, the collection of said charges by plaintiff Airlines under said ordinance will expose plaintiff Airlines to liability and multiple lawsuits brought against plaintiff Airlines for relief from the unconstitutional imposition of said charge and for reimbursement thereof by interstate passengers compelled by plaintiffs to pay said charge.

4. The collection of said illegal and unconstitutional charges, as required by said Ordinance Number 33, will cause plaintiff Airlines to suffer great expense and inconvenience, resulting in serious impairment of plaintiff Airlines' businesses, by reason of which plaintiff Airlines will be deprived of property without due process of law in violation of Amendment Fourteen to the Constitution of the United States.

5. The failure of or refusal by plaintiff Airlines to collect, or the failure or refusal of plaintiff Airlines' passengers to pay, the unconstitutional charge imposed by said ordinance will result in plaintiff Airlines' passengers being denied transportation by plane, or, if allowed to enplane, will expose plaintiff Airlines, their employees and agent and passengers, to criminal liability under the following provisions of the Indiana Statute creating the EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished

by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

6. That by reason of the foregoing, the plaintiff Airlines allege that enforcement of said Ordinance Number 33 will, if not enjoined, cause great injury and damage to plaintiff Airlines and to plaintiff Airlines' interstate air line customers, for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

7. If plaintiff Airlines are required to enforce said ordinance and collect the charges imposed thereby beginning on July 1, 1968, the illegal and unconstitutional collection of said charges from air line passengers traveling in interstate commerce, or the refusal to collect illegal charges, will, unless restrained without notice and enjoined by this Court, expose plaintiff Airlines, and their employees and agents, to immediate liability thereby causing substantial injury to plaintiffs, their employees and agents, and to their commercial air line businesses, all in violation of plaintiff Airlines' rights for which they have no adequate remedy at law.

8. If said Ordinance Number 33 is enforced, plaintiff Airlines' passengers who are citizens of the United States traveling in interstate commerce will be immediately inhibited and injured in their right to travel freely between the States and from place to place within the State of Indiana and will be placed in danger of arrest and prosecution for failure or refusal to pay the charge thereby imposed.

9. The magnitude of the violation of said passengers' rights secured to them by the Constitution of the United States and the resulting exposure of said passengers to grave and irreparable injury is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary restraining order without notice to the defendants, or any of them, to preserve the status quo and to prevent immediate injury.

10. That the illegality of the conduct required of plaintiff Airlines under said ordinance and resulting exposure of plaintiffs to great and irreparable injury is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary restraining order without notice to the defendants, or any of them, to preserve the status quo and to prevent immediate injury to plaintiff Airlines.

11. That plaintiff Airlines will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary restraining order or temporary injunction.

WHEREFORE, plaintiff Airlines pray as follows:

A. That an order be entered herein without notice by this Court restraining and enjoining until further order of this Court or until such time as a hearing on plaintiff Airlines' application for a temporary injunction may be had, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance Number 33 on its effective date of July 1, 1968, or

at any time thereafter and from taking any steps to enforce the provisions of said ordinance in any manner;

2. Requiring, compelling, demanding, or otherwise requesting that plaintiff Airlines, and their employees and agents, make any collection of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter, and from otherwise taking any action or causing any action to be taken against plaintiff Airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter;
3. Instituting or causing to be instituted any criminal proceedings against plaintiff Airlines, or their employees and agents, for the non-collection of the charges imposed by said Ordinance Number 33;
4. Otherwise taking any action, because of the non-collection of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the operation by plaintiff Airlines of their businesses in Vanderburgh County, Indiana;
5. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of

this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter; and from taking any action whatsoever because of the non-payment of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That a hearing on plaintiff Airlines' application for a temporary injunction be held on or before the 31st day of July, 1968, and after such hearing that a temporary injunction be issued granting the relief herein above prayed for.

C. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff Airlines' costs in such amount as the Court may determine.

D. That this Court enter an order declaring said Ordinance Number 33 to be unconstitutional under the Privileges and Immunities, Equal Protection, and Due Process Clauses of the Constitution of the United States.

E. That the plaintiff Airlines have such further relief in the premises as may be just and equitable.

DELTA AIR LINES, INC.
EASTERN AIRLINES
LAKE CENTRAL AIRLINES, INC.

s / Fred P. Bamberger
 Fred P. Bamberger
 s / Jeffrey R. Kinney
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Attorneys for Plaintiffs

PARAGRAPH III

Plaintiffs DELTA AIR LINES, INC., EASTERN AIRLINES, and LAKE CENTRAL AIRLINES, INC., hereinafter sometimes referred to as "plaintiff Airlines," for their third cause of action allege and say:

1. Plaintiff Airlines hereby adopt and reallege and incorporate by reference the allegations contained in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of Paragraph I of their complaint as if herein set out in full.

2. Said Ordinance Number 33 imposes an arbitrary and discriminatory charge upon air line passengers departing Dress Memorial Airport and is in direct violation and contravention of the Equal Protection Clause of Amendment Fourteen of the Constitution of the United States and Article 1, Section 23, of the Constitution of the State of Indiana, said ordinance imposing a charge upon enplaning air line passengers who are a minority class of users of the airport facilities purportedly for the use of airport facilities, but said ordinance not imposing any charge upon deplan-

ing passengers and other persons and corporations making like use of airport facilities either for transportation, air freight shipments, observation, dining and other uses, said charge additionally having no reasonable relation to the services and facilities purportedly furnished said passengers and being wholly arbitrary and unreasonable.

3. By reason of said unconstitutionality, the collection of said charges by plaintiff Airlines under said ordinance will expose plaintiff Airlines to liability and multiple lawsuits brought against plaintiff Airlines for relief from the unconstitutional imposition of said charge and for reimbursement thereof by interstate passengers compelled by plaintiffs to pay said charge.

4. The failure of or refusal by plaintiff Airlines to collect the unconstitutional charge imposed by said ordinance will expose plaintiffs, and their employees and agents, to criminal liability under the following provisions of the Indiana Statute creating the EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

5. That by reason of the foregoing, the plaintiff Airlines allege that enforcement of said Ordinance Number 33 will, if not enjoined, cause great injury and damage to plaintiff Airlines and to plaintiff Airlines'

interstate air line customers, for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

6. If plaintiff Airlines are required to enforce said ordinance and collect the charges imposed thereby beginning on July 1, 1968, the illegal and unconstitutional collection of said charges from air line passengers traveling in interstate commerce, or the refusal to collect said illegal charges, will, unless restrained without notice and enjoined by this Court, expose plaintiff Airlines and their employees and agents to immediate liability thereby causing substantial injury to plaintiff Airlines, their employees and agents, and to their commercial air line businesses, all in violation of plaintiff Airlines' rights for which they have no adequate remedy at law.

7. That the illegality of the conduct required of plaintiff Airlines under said ordinance and resulting exposure of plaintiffs to great and irreparable injury is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary restraining order without notice to the defendants, or any of them, to preserve the status quo and to prevent immediate injury to plaintiff Airlines.

8. That plaintiff Airlines will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary restraining order, temporary injunction or permanent injunction.

WHEREFORE, plaintiff Airlines pray as follows:

A. That an order be entered herein without notice by this Court restraining and enjoining until further

order of this Court or until such time as a hearing on plaintiff Airlines' application for a temporary injunction may be had, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance Number 33 on its effective date of July 1, 1968, or at any time thereafter and from taking any steps to enforce the provisions of said ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that plaintiff Airlines, and their employees and agents, make any collection of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter, and from otherwise taking any action or causing any action to be taken against plaintiff Airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter;
3. Instituting or causing to be instituted any criminal proceeding against plaintiff Airlines, or their employees and agents, for the non-collection of the charges imposed by said Ordinance Number 33;
4. Otherwise taking any action, because of the non-collection of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the operation by plaintiff Airlines of their businesses in Vanderburgh County, Indiana;
5. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air

passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter; and from taking any action whatsoever because of the non-payment of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That a hearing on plaintiff Airlines' application for a temporary injunction be held on or before the 31st day of July, 1968, and after such hearing that a temporary injunction be issued granting the relief herein above prayed for.

C. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff Airlines' costs in such amount as the Court may determine.

D. That this Court enter an order declaring said Ordinance Number 33 to be unconstitutional under the Equal Protection Clauses of Amendment Fourteen of the Constitution of the United States and Article 1, Section 23 of the Constitution of the State of Indiana.

E. That the plaintiff Airlines have such further relief in the premises as may be just and equitable.

DELTA AIR LINES, INC.
EASTERN AIRLINES
LAKE CENTRAL AIRLINES, INC.

s / Fred P. Bamberger
 Fred P. Bamberger
 s / Jeffrey R. Kinney
 Jeffrey R. Kinney

Of Counsel:

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 Washington, D.C. 20036
Attorneys for Plaintiffs

PARAGRAPH IV

Plaintiffs DELTA AIR LINES, INC., EASTERN AIRLINES, and LAKE CENTRAL AIRLINES, INC., hereinafter sometimes referred to as "plaintiff Airlines," for their fourth cause of action allege and say:

1. Plaintiff Airlines hereby adopt and reallege and incorporate by reference the allegations contained in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of Paragraph I of their complaint as if herein set out in full.
2. That the charge imposed by said ordinance bears no reasonable relation to any facilities or services purportedly furnished to enplaning air line passengers and has no basis in fact, the charge of One Dollar (\$1.00) being wholly arbitrary and not taking into consideration the different and varied uses and non-uses

of airport facilities, or the actual needs for revenue for the maintenance and operation of said airport.

3. That, additionally, said charge is wholly discriminatory and places the entire levy upon only a minority class of the persons using said airport facilities, depriving air passengers and other persons and corporations using the airport facilities for non-commercial flights, air freight shipments, observation, dining and other uses not being required to pay any charge whatsoever.

4. That the statute which is purportedly the authority for the enactment of said ordinance and the imposition of said charge (Burns' Ind. Ann. Stats. (1946 Repl.) Section 14-1215, Clauses 9 and 16) does not, in fact, contain legislative authorization for the enactment of an ordinance imposing an arbitrary and discriminatory charge upon enplaning air line passengers, said charge being, in reality, a wholly arbitrary, discriminatory, and unreasonable head tax levied against a minority class of airport users.

5. That, by reason of the foregoing, the ordinance imposing said charge is wholly illegal as an ultra vires act of the defendant EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT, there being no statutory delegation by the General Assembly of the State of Indiana of the power to enact such an ordinance and levy the charge imposed thereunder, said Ordinance Number 33 therefore being wholly void for want of jurisdiction.

6. That, additionally, the imposition of said charge which is in reality a tax imposed upon enplaning air passengers, who are a minority class of airport users, is in direct violation and contravention of Article 10,

Section 1, of the Constitution of the State of Indiana, said tax not being provided for by the General Assembly of the State of Indiana, the power to impose such a tax not being delegated by the General Assembly of the State of Indiana, and the tax not being uniformly and equally imposed upon all persons who make use of facilities at Dress Memorial Airport.

7. By reason of said illegality and unconstitutionality, the collection of said charges by plaintiff Airlines under said ordinance will expose plaintiff Airlines to liability and multiple lawsuits brought against plaintiff Airlines for relief from the illegal and unconstitutional imposition of said charge and for reimbursement thereof by air passengers compelled by plaintiffs to pay said charge.

8. The failure of or refusal by plaintiff Airlines to collect the illegal charge imposed by said ordinance will expose plaintiff Airlines, and their employees and agents, to criminal liability under the following provisions of the Indiana Statute creating the EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

9. That by reason of the foregoing, the plaintiff Airlines allege that enforcement of said Ordinance Number 33 will, if not enjoined, cause great injury and damage to plaintiff Airlines and to plaintiff Air-

lines' interstate air line customers, for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

10. If plaintiff Airlines are required to enforce said ordinance and collect the charges imposed thereby beginning on July 1, 1968, the illegal collection of said charges from air line passengers traveling in interstate commerce, or the refusal to collect said illegal charges, will, unless restrained without notice and enjoined by this Court, expose plaintiff Airlines and their employees and agents to immediate liability thereby causing substantial injury to plaintiff Airlines, their employees and agents, and to their commercial air line businesses, all in violation of plaintiff Airlines' rights for which they have no adequate remedy at law.

11. That the illegality of the conduct required of plaintiff Airlines under said ordinance and resulting exposure of plaintiffs to great and irreparable injury is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary restraining order without notice to the defendants, or any of them, to preserve the status quo and to prevent immediate injury to plaintiff Airlines.

12. That plaintiff Airlines will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary restraining order, temporary order, or temporary injunction.

WHEREFORE, plaintiff Airlines pray as follows:

A. That an order be entered herein without notice by this Court restraining and enjoining until further

order of this Court or until such time as a hearing on plaintiff Airlines' application for a temporary injunction may be had, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance Number 33 on its effective date of July 1, 1968, or at any time thereafter and from taking any steps to enforce the provisions of said ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that plaintiff Airlines, and their employees and agents, make any collection of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter, and from otherwise taking any action or causing any action to be taken against plaintiff Airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or any time thereafter;
3. Instituting or causing to be instituted any criminal proceedings against plaintiff Airlines, or their employees and agents, for the non-collection of the charges imposed by said Ordinance Number 33;
4. Otherwise taking any action, because of the non-collection of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the operation by plaintiff Airlines of their businesses in Vanderburgh County, Indiana;
5. Requiring, compelling, demanding, or otherwise

requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance Number 33 on July 1, 1968, or at any time thereafter; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance Number 33 not be enforced on July 1, 1968, or at any time thereafter; and from taking any action whatsoever because of the non-payment of said charges imposed by Ordinance Number 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That a hearing on plaintiff Airlines' application for a temporary injunction be held on or before the 31st day of July, 1968, and after such hearing that a temporary injunction be issued granting the relief herein above prayed for.

C. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff Airlines' costs in such amount as the Court may determine.

D. That this Court enter an order declaring said Ordinance Number 33 to be illegal and void by reason of the non-existence of delegated legislative authority for the enactment of such ordinance and unconstitutional as in violation of Article 10, Section 1, of the Constitution of the State of Indiana.

E. That the plaintiff Airlines have such further relief in the premises as may be just and equitable.

DELTA AIR LINES, INC.
EASTERN AIRLINES
LAKE CENTRAL AIRLINES, INC.
 s / Fred P. Bamberger
 Fred P. Bamberger
 s / Jeffrey R. Kinney
 Jeffrey R. Kinney

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ATTORNEYS FOR PLAINTIFFS
Attorneys for Plaintiffs

(Verification omitted in printing.)

**EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT**

ORDINANCE NO. 33

**AN ORDINANCE ESTABLISHING AND FIXING
A USE AND SERVICE CHARGE FOR ALL EN-
PLANING PASSENGERS UTILIZING AIRPORT
PREMISES AND FACILITIES.**

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana, and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to

said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admission and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement,

equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial Aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

- (a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;
- (b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittances shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar (\$1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said air-

lines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include, nor shall the use and service charge hereby created, apply to any active member of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 28th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

s / Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:

s / Robert M. Leich
Robert M. Leich, Secretary

STATE OF INDIANA)

COUNTY OF VANDERBURGH)

SS: •

I, the undersigned, Secretary of the Evansville-Vanderburgh Airport Authority District, do hereby certify that the attached Ordinance No. 33 consisting of four pages is a full, true, and correct copy of Ordinance No. 33 which was passed by the Board of Directors of the Evansville-Vanderburgh Airport Authority District on February 26, 1968.

I further certify that the attached Ordinance No. 33 is presently in force and will take effect on the first day of July, 1968.

s / Robert M. Leich
Robert M. Leich, Secretary
Evansville-Vanderburgh Airport
Authority District

SUBSCRIBED and SWORN to before me, a Notary

Public, in and for said County and State this 24th day
of June, 1968.

s/ Howard P. Trockman
Howard P. Trockman
Notary Public

My Commission expires:
1-8-72

**PARTIES' STIPULATION OF FACTS SUBMITTED
TO VANDERBURGH SUPERIOR COURT
(R. 469)**

(Caption Omitted in Printing)

**STIPULATION OF FACTS FOR
HEARING ON TEMPORARY INJUNCTION**

It is agreed by the parties that the following statement of facts is true, and it is further stipulated and agreed that the Court may consider the same as the facts of this case for the hearing on plaintiffs' application for a temporary injunction, and it is specially stipulated and agreed that the Court may draw inferences and deductions from said facts in the same manner as when evidence is introduced in the ordinary way. It is further stipulated and agreed that any of the parties may object to any stipulated facts urging the ground that such facts are irrelevant and immaterial, but they do agree that all said facts are true:

A. FACTS SUBMITTED BY PLAINTIFFS

1. Delta Air Lines, Inc., is a corporation organized under the laws of the State of Louisiana and is duly authorized to transact business in the State of Indiana.

2. Eastern Airlines is a corporation organized under the laws of the State of Delaware and is duly authorized to transact business in the State of Indiana.

3. Allegheny Airlines, Inc., successor to Lake Central Airlines, Inc., is a corporation organized under the laws of the State of Delaware and is duly authorized to transact business in the State of Indiana.

4. The Evansville-Vanderburgh Airport Authority District is the owner and operator of Dress Memorial Airport in Vanderburgh County, Indiana.

5. Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, and Clifford K. Arden are members

of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

6. James A. Geyer is the airport manager of Dress Memorial Airport and is the Treasurer of the Evansville-Vanderburgh Airport Authority District.

7. Eastern Airlines and Allegheny Airlines, Inc., are commercial air carriers transporting passengers, freight, express, and mail to and from Dress Memorial Airport solely in interstate commerce. Delta Air Lines, Inc., is a commercial air carrier transporting passengers, freight, express, and mail to and from Dress Memorial Airport in interstate and intrastate commerce. Each of the plaintiff airlines are air carriers operating under Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board and are duly authorized pursuant to said Certificates to operate commercial aircraft and to enplane and deplane commercial air passengers, express, freight, and mail therefrom at Dress Memorial Airport between specified cities set forth in said Certificates. Each of the plaintiff airlines leases and operates facilities at Dress Memorial Airport for the purposes of providing commercial air passenger and freight service. The facilities operated by the plaintiff airlines include air passenger ticket counters, offices, storage space and other facilities. Exhibits 1, 2 and 3 which are attached hereto are true and correct copies of said leases which are now in force.

8. On June 28, 1968, Delta Air Lines, Inc., operated nine (9) regularly scheduled flights daily from Dress Memorial Airport, of which three (3) flights were direct flights to locations beyond the State of Indiana; five (5) flights terminated at locations beyond the State of Indiana with intermediate stops in Indiana;

and one (1) flight terminated solely within the State of Indiana. In January, 1969, Delta Air Lines, Inc., was operating nine (9) regularly scheduled daily flights of which five (5) are direct flights to locations beyond the State of Indiana. Three (3) flights terminate at locations beyond the State of Indiana with intermediate stops in Indiana, and one (1) flight terminates in Indiana. During the twelve months preceding December 31, 1967, Delta Air Lines, Inc., carried 73,634 passengers enplaning at Dress Memorial Airport, a majority of whom were carried to destinations beyond the State of Indiana.

9. On June 28, 1968, and continuing through the present time, Eastern Airlines has operated six (6) regularly scheduled flights daily from Dress Memorial Airport, all of which are direct flights to locations beyond the State of Indiana. During the twelve months preceding December 31, 1967, Eastern Airlines carried 59,400 passengers enplaning at Dress Memorial Airport, all of whom were carried to destinations beyond the State of Indiana.

10. On June 28, 1968, Lake Central Air Lines, Inc., operated two (2) regularly scheduled flights daily from Dress Memorial Airport, both of which were direct flights to locations beyond the State of Indiana. In January, 1969, Allegheny Airlines, Inc., successor to Lake Central Airlines, Inc., continues to operate two (2) regularly scheduled flights daily from Dress Memorial Airport which are direct flights to locations beyond the State of Indiana. During the twelve months preceding December 31, 1967, Lake Central Airlines, Inc., carried 13,679 passengers enplaning at Dress Memorial Airport, all of whom were carried to destinations beyond the State of Indiana.

11. During the twelve months preceding June 30, 1967, a total of 128,396 persons departed from Dress Memorial Airport upon scheduled and nonscheduled commercial air carriers.

12. In the year 1967, there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights at Dress Memorial Airport. In 1967, there were some 14,834 take-offs and landings by commercial air carriers at Dress Memorial Airport. In the same year, there were 84,598 take-offs and landings by other civil and military aircraft, both local and itinerant, as follows:

A. Itinerant take-offs and landings	1,329
B. Itinerant civil take-offs and landings	49,959
C. Local military take-offs and landings	1,077
D. Local civil take-offs and landings	34,639

13. The airport facilities at Dress Memorial Airport include but are not necessarily limited to the following facilities and services:

- (1) Main Terminal Building
 - air passenger service counters
 - air freight service counters and facilities
 - waiting room
 - rest rooms
 - dining room
 - bar
 - lunch counter
 - newsstand
 - barber shop
 - display areas
 - taxi stands
 - car rental counters
 - telephone booths

(2) Other Facilities

private hangar facilities
 nonscheduled airline hangar facilities, office
 space, and waiting areas
 entrance and exit facilities and sidewalks
 parking lots
 fuel storage areas
 office space
 runways and taxi-ways
 approach lighting system
 instrument lighting system

14. In addition to the use of one or more of the airport facilities and services by enplaning air passengers, one or more of the foregoing facilities and services are also used by the following persons who are not subject to a \$1.00 service charge imposed upon enplaning passengers:

- a. persons using the airport facilities after arrival at the airport upon commercial aircraft;
- b. persons using the airport facilities and services upon arrival or departure from Dress Memorial Airport by means of noncommercial or nonscheduled aircraft (persons in this category may not ordinarily use the Main Terminal facilities upon arrival or departure but may do so to make use of service facilities located in the Main Terminal Building such as the restaurant, bar, barber shop, taxi stands, car rental stands, etc.);
- c. persons and corporations using the airport facilities to transport and receive air freight shipments;
- d. persons using airport facilities when meeting or seeing off air passengers;

- e. persons using the airport facilities for entertainment purposes and observing the arrival or departure of aircraft;
- f. persons using the airport facilities incidental to the use of dining and bar facilities and other public facilities and services located at said airport; and
- g. other persons making use of the airport facilities who are not departing from said airport.

The classes of persons enumerated in subparagraphs a. through g. numerically constitute a majority of persons who use one or more of the facilities located at said airport.

15. On February 26, 1968, the Board of the Evansville-Vanderburgh Airport Authority District enacted an ordinance known as Ordinance No. 33 which levies a charge of \$1.00 on every enplaning commercial air passenger at Dress Memorial Airport with exceptions for active military personnel and persons temporarily stopping at Dress Memorial Airport enroute to other destinations. Persons arriving at Dress Memorial Airport from some other locality using a round trip ticket written at that other locality would be subject to the \$1.00 service charge upon departure from Dress Memorial Airport regardless of the length of time between their arrival and departure; said service charge would be paid at the time the round trip ticket is purchased.

16. Exhibit 4 which is attached hereto is a true and correct copy of Ordinance No. 33 which was to take effect on July 1, 1968.

17. An air passenger intending to depart Dress Me-

morial Airport who purchased a ticket and paid the service charge but did not enplane would not be subject to the service charge and would be entitled to a refund thereof.

18. In 1966, 88.4% of the persons departing Dress Memorial Airport upon plaintiff airlines enplaned for ultimate destinations beyond the State of Indiana.

19. At present, the percentage of persons departing Dress Memorial Airport upon plaintiff airlines for ultimate destinations beyond the State of Indiana is approximately the same percentage as is stated in paragraph 18 above although said percentage would be subject to change because of changes in schedules.

20. Some persons desiring to travel by air from Dress Memorial Airport might be deterred therefrom because of the payment of air tariff ticket charges exclusive of any enplanement fee.

21. Exhibit 5 which is attached hereto is a summary of General Fund Revenues of the Evansville-Vanderburgh Airport Authority District for its operations at Dress Memorial Airport for the year 1967.

22. Dress Memorial Airport is the only commercial airport within an area of approximately 100 miles of Evansville, Indiana, with the exception of Owensboro, Kentucky, and said Airport serves a large portion of southeastern Illinois and northwestern Kentucky as well as southwestern Indiana. A substantial number of persons using Dress Memorial Airport are citizens of the States of Kentucky and Illinois, and their journeys originate in those states.

23. If an enplaning air passenger refuses to pay the \$1.00 service charge, the plaintiff airlines have two al-

ternatives. One alternative is to enplane the passenger and pay the charge themselves, assuming the passenger has paid the air travel charge. The second alternative is to refuse to enplane the passenger.

24. The tax levy for the year 1968 imposed by the Evansville-Vanderburgh Airport Authority District on assessed property located in Vanderburgh County, Indiana, is between four and five cents per \$100.00 of assessed valuation. In addition to this levy there was a Cumulative Building Fund Levy of two cents per \$100.00 of assessed valuation.

25. Air passenger tickets for departure (enplane-ment) from Dress Memorial Airport can be sold or written by the following persons or corporations:

- a. plaintiff airlines through offices in Evansville, Indiana.
- b. plaintiff airlines through offices located in every state in the United States and other locations outside the United States.
- c. other air carriers through offices located in every state in the United States and locations outside the United States.
- d. travel agency offices located in every state in the United States and localities outside the United States.
- e. private persons and corporations located in every state in the United States and locations outside the United States.

26. A substantial number of airline tickets for departure from Dress Memorial Airport are written by travel agencies, private persons and corporations authorized to write their own tickets, and by other com-

mercial airlines who are authorized to write tickets upon the plaintiff airlines.

27. Because many airline tickets for departures from Dress Memorial Airport are sold by persons and corporations other than the plaintiff airlines, the only effective and practical method by which the plaintiff airlines can be assured that every person boarding one of their aircraft at Dress Memorial Airport pays the \$1.00 service charge is to publish said charge as part of or in addition to their tariffs and rates for departure from Dress Memorial Airport. Plaintiff airlines would incur costs and expenses in effecting tariff charges and providing nationwide accounting and remittance procedures. The costs and expenses of effecting and operating said changes and procedures might or might not exceed the six percent (6%) collection fee permitted the air carriers under Ordinance No. 33.

28. Each of the plaintiff airlines has employees stationed at Dress Memorial Airport who travel both in intrastate and interstate commerce by air on airline business. The transportation costs for said trips are paid by plaintiff airlines, and the plaintiff airlines would directly pay or reimburse their employees for the \$1.00 charge required by Ordinance No. 33 which would be imposed on the enplanement of their employees as passengers on commercial airlines for business trips for plaintiff airlines.

B. FACTS SUBMITTED BY DEFENDANT

1. That during the year 1966 there were 120,197 enplaning passengers at Dress Memorial Airport. During the year 1967 there were 146,955 enplaning passengers at Dress Memorial Airport. During both of said years

there were approximately the same number of deplaning passengers at said airport.

2. As of December 31, 1967, there were capital improvement bonds of Dress Memorial Airport outstanding in the principal sum of \$180,000.00 resulting from the issuance of bonds during the year 1960, which bonds will finally be retired on July 1, 1973.

3. As of December 31, 1967, there were bonds outstanding in the principal sum of \$332,000.00 resulting from the issuance of bonds during the year 1960, which bonds will finally be retired on January 1, 1977.

4. As of December 31, 1967, there were bonds outstanding in the principal sum of \$823,000.00 resulting from the issuance of bonds during the year 1960, which bonds will finally be retired on January 1, 1979.

5. As of December 31, 1967, there was a total bonded indebtedness outstanding and payable by Evansville-Vanderburgh Airport Authority District of \$1,335,000.00.

6. On December 23, 1968, the defendant, Evansville-Vanderburgh Airport Authority District, approved and adopted a report of its consultants, Ralph H. Burke, Inc., of Park Ridge, Illinois, which report includes preliminary cost estimates for the expansion of commercial airline passenger claim areas, expansion of the Terminal Building which is used by commercial airlines, its passengers and personnel, and for the reconstruction of the entrance and exit road at said Airport having an estimated cost of \$948,000.00, which report is attached hereto, made a part hereof and identified as "Exhibit A."

7. On said date of December 23, 1968, the Board of Evansville-Vanderburgh Airport Authority District

determined to issue bonds in the sum of \$980,000.00 in order to cover the cost of constructing all the improvements set forth in Stipulation No. 6. The retirement of said bonds will require, on the basis of a 15 year amortization, a yearly principal payment in excess of \$65,000.00 and interest which is payable at a rate of not more than five percent (5%) of the unpaid principal balance. Assuming that a five percent (5%) interest rate would prevail, an interest payment during the first year of amortization of \$49,000.00 would be required. Based on said five percent (5%) interest rate, each subsequent year of amortization would result in a reduction in interest payments of \$3,266.66.

8. On September 24, 1962, the Board of Evansville-Vanderburgh Airport Authority District formally adopted a Master Plan for the development of Dress Memorial Airport, 1962 to 1971, a copy of which said Master Plan is attached hereto, made a part hereof and identified as "Exhibit B." The fulfillment of the capital improvements of said Master Plan and the retirement of the indebtedness created thereby will require more additional revenues than would be produced by Ordinance No. 33 assuming that said improvements are amortized over a 15 year period in the manner set forth in Defendants' Submitted Facts No. 7, and assuming further that the forecast of probable passenger movements at Dress Memorial Airport is reasonably accurate.

9. Ordinance No. 33 imposes a use and service charge of \$1.00 on all enplaning passengers of commercial airlines at Dress Memorial Airport, whether said enplaning passengers travel in intra- or inter-state commerce.

10. The Terminal Building at Dress Memorial Air-

port is primarily designed for use by persons traveling on commercial airlines.

11. Most of the facilities constituting the Terminal Building at Dress Memorial Airport would not be essential for the operation of a noncommercial airport except for the required use thereof by persons traveling on commercial airlines.

12. The runway lengths, approach areas, taxiways and ramp areas of said Dress Memorial Airport would not be so extensive except for the requirement that the same be sufficiently extensive in order to accommodate commercial airline carriers and their passengers.

13. The present existing runway lengths at Dress Memorial Airport are as follows:

Northeast-Southwest Runway	— 8023 ft;
North-South Runway	— 5084 ft;
East-West Runway	— 3502 ft;

Each of the foregoing runways is 150 feet in width.

14. Runway length requirements for private, non-commercial aircraft using Dress Memorial Airport or other airports similarly located and situated are as follows: a runway length of 3500 to 4000 feet would be required, and, while most noncommercial airports throughout the country have only one runway, it is desirable that there be constructed two runways of the same length, to-wit: 3500 to 4000 feet, which would constitute cross-wind runways. Required construction for said runways would be a grass or other stabilized surface such as blacktop of approximately 3 inches in depth. The required width of said runways would not exceed 50 to 75 feet. The cost of constructing said runways for private, noncommercial aircraft (aircraft weighing less than 12,500 lbs.) would be approximately \$25.00 per lineal foot, exclusive of actual ground costs.

15. Present construction requirements established by the Federal Aviation Administration dictate that runways for use by commercial aircraft shall be of reinforced concrete, 12 inches in depth and not less than 150 feet in width. Present construction costs for such runways to serve commercial aircraft approximate \$200.00 per lineal foot, exclusive of actual ground costs.

16. The present real estate owned by the defendant, Evansville-Vanderburgh Airport Authority District, at the Dress Memorial Airport consists of 1330 acres, whereas only approximately 200 to 300 acres of real estate would be required in order to maintain an airport for use by private, noncommercial aircraft (aircraft weighing less than 12,500 lbs.).

17. Dress Memorial Airport operates and maintains an instrument lighting system and an approach lighting system for use by commercial airlines, both of which are costly to maintain and operate and would not be necessary in connection with use by private, noncommercial aircraft.

18. All persons operating private civil aircraft at Dress Memorial Airport pay a fuel flowage fee of five cents (5¢) per each gallon of gas purchased at Dress Memorial Airport, which fee is collected by the Fixed Base Operators at said Airport and remitted to the defendant, Evansville-Vanderburgh Airport Authority District. During the year 1967, the defendant, Evansville-Vanderburgh Airport Authority District, derived the sum of \$47,862.77 from the imposition of said fuel flowage fee which was collected and paid by the Fixed Base Operators located at Dress Memorial Airport.

19. The defendant, Evansville-Vanderburgh Airport Authority District, is entitled to receive for each

dollar of food commodity and non-alcoholic beverage sales at the dining room located in the Dress Memorial Airport Terminal Building the sum of $7\frac{1}{2}\%$, which sum is additional rental and is paid from the gross receipts by the lessee of said restaurant, Indiana Caterers, Inc. With respect to the sale of alcoholic beverages, the defendant, Evansville-Vanderburgh Airport Authority District, is entitled to receive for each dollar of sales of alcoholic beverages the sum of $12\frac{1}{2}\%$, which sum is additional rental and is paid from the gross receipts to the defendant by said lessee. During the year 1968, the lessee of the Airport Terminal Building restaurant, Indiana Caterers, Inc., paid to the defendant, Evansville-Vanderburgh Airport Authority District, as additional rental, the sum of \$22,674.51.

20. Ten cents (10¢) of each dollar derived from the rental of automobiles to persons at the Dress Memorial Airport is paid to the Evansville-Vanderburgh Airport Authority District as additional rental from gross receipts by the lessees who operate the Avis and National Car Rental franchises at said Airport (the Hertz Car Rental franchise pays 8.5% of gross receipts under its original and earlier contract which has not yet expired). During the year 1967, Avis Rent-a-Car paid to the defendant, Evansville-Vanderburgh Airport Authority District, the sum of \$24,981.07, and Hertz Rent-A-Car paid the sum of \$26,201.33 to the defendant, Evansville-Vanderburgh Airport Authority District. (National Car Rental did not commence its lease until 1969.)

21. All persons using the parking facilities located at Dress Memorial Airport are required to pay in accordance with established rates approved by the defendant, Evansville-Vanderburgh Airport Authority

District, and, the defendant, Evansville-Vanderburgh Airport Authority District, is entitled to receive as additional rental the following percentages of all gross sums derived from such parking charges:

20.4% of all gross receipts for the first \$25,000.00;

25% of that portion of gross annual receipts in excess of \$25,000.00 but not in excess of \$50,000.00 per annum;

75% of that portion of gross annual receipts in excess of \$50,000.00 but not in excess of \$100,000.00 per annum;

80% of that portion of gross annual receipts in excess of \$100,000.00 per annum.

During the year 1968, the lessee of the parking lot paid to the defendant, Evansville-Vanderburgh Airport Authority District, the sum of \$19,767.51.

22. In order to help defray capital improvement costs at Dress Memorial Airport, as set out in the budgets of the defendant, Evansville-Vanderburgh Airport Authority District, for the years 1965 through 1968, there exists a Cumulative Building Fund Levy which was established by said defendant and approved by the Indiana State Board of Tax Commissioners, which Cumulative Building Fund Levy has provided a total of approximately \$400,000.00 which has been used in connection with the purchase of real estate and the defrayment of certain capital improvement costs at the Dress Memorial Airport. The Cumulative Building Fund Levy is not reflected in and is in addition to the yearly tax levies of the defendant, Evansville-Vanderburgh Airport Authority District, required to be made in order to pay bond retirement costs as more parti-

cularly set forth in Defendants' Submitted Facts 23, 24, 25 and 26.

23. For the year 1965, principal and interest payments on outstanding bonded indebtedness of the defendant, Evansville-Vanderburgh Airport Authority District, for capital improvements at Dress Memorial Airport, were in the sum of \$166,059.00. During the year 1965, the operating budget and expenses and debt retirement costs of the defendant, Evansville-Vanderburgh Airport Authority District, were in the total sum of \$332,976.80, and the revenues of said defendant for the same year, derived from all sources, exclusive of tax revenues, were in the sum of \$176,653.10. The revenues of Dress Memorial Airport were only sufficient to satisfy \$9,735.30 of said bond retirement costs of \$166,059.00.

24. For the year 1966, principal and interest payments on outstanding bonded indebtedness of the defendant, Evansville-Vanderburgh Airport Authority District, for capital improvements at Dress Memorial Airport, were in the sum of \$184,462.04. During the year 1966, the operating budget and expenses and debt retirements costs of the defendant, Evansville-Vanderburgh Airport Authority District, were in the total sum of \$344,326.64, and the revenues of said defendant for the same year, derived from all sources, exclusive of tax revenues, were in the sum of \$223,318.35. The revenues of Dress Memorial Airport were only sufficient to satisfy \$63,453.75 of said bonded retirement costs of \$184,462.04.

25. For the year 1967, principal and interest payments on outstanding bonded indebtedness of the defendant, Evansville-Vanderburgh Airport Authority District, for capital improvements at Dress Memorial

Airport, were in the sum of \$182,164.54. During the year 1967, the operating budget and expenses and debt retirement costs of the defendant, Evansville-Vanderburgh Airport Authority District, were in the total sum of \$363,431.21, and the revenues of said defendant for the same year, derived from all sources, exclusive of tax revenues, were in the sum of \$268,970.33. The revenues of Dress Memorial Airport were only sufficient to satisfy \$87,703.66 of said bond retirement costs of \$182,164.54.

26. For the year 1968, principal and interest payments on outstanding bonded indebtedness of the defendant, Evansville-Vanderburgh Airport Authority District, for capital improvements at Dress Memorial Airport, were in the sum of \$178,867.04. During the year 1968, the operating budget and expenses and debt retirement costs of the defendant, Evansville-Vanderburgh Airport Authority District, were in the total sum of \$400,846.71, and the revenues of said defendant for the same year, derived from all sources, exclusive of tax revenues, were in the sum of \$287,582.03. The revenues of Dress Memorial Airport, therefore, were only sufficient to satisfy \$65,602.36 of said bond retirement costs of \$178,867.04.

27. Approximately forty percent (40%) of the users of the Dress Memorial Airport are non-residents of Vanderburgh County, Indiana, and do not own property in said county. The funds which are needed, over and above operating revenues, to retire existing and future capital improvement costs at Dress Memorial Airport, prior to the enactment of Ordinance No. 33 establishing a use and service charge, are derived from tax levies on all assessed property located within Vanderburgh County, Indiana. The use and service charge

established by said Ordinance is designed to be collected from all commercial airline enplaning passengers who use Dress Memorial Airport, without regard to their residence or ownership of property within Vanderburgh County, Indiana.

28. During the years 1965 through 1968, the plaintiffs paid to the defendant, Evansville-Vanderburgh Airport Authority District, the following sums for field use payments:

	Delta	Eastern	Lake Central (Allegheny)
1965	\$ 8,649.12	\$12,149.40	\$3,705.38
1966	18,971.82	12,658.92	5,508.31
1967	18,658.85	25,895.72	4,955.33
1968	18,767.98	20,208.18	4,245.11

29. Based upon the present bonded indebtedness of the defendant, Evansville-Vanderburgh Airport Authority District, and the need for additional capital improvements at Dress Memorial Airport, as shown by the exhibits attached hereto and these stipulations, there exists a need for additional revenue. Ordinance No. 33 of the defendant, Evansville-Vanderburgh Airport Authority District, was designed to raise this additional revenue.

30. Set forth in "Exhibit C" attached hereto and made a part hereof, is a list of thirty-five (35) states which, by legislation, have imposed fuel and highway use taxes on commercial and common carriers using the highways of the various states listed. In most states, said fuel and use taxes are based upon the number of miles traveled by the carrier within the respective states, which mileage is divided by an average of five (5) miles per gallon and the result of which is then multiplied by the tax rate per gallon established by

each state. If the carrier cannot show proof of payments of the amount of fuel and use tax imposed, through purchases made in the state imposing the fuel and use tax, then such carrier is required to pay any deficiency by reports which are required to be filed by such states at regular intervals during the year.

As noted by "Exhibit C" attached, some states, in addition to highway fuel and use taxes, impose taxes based upon gross receipts (Arizona, California and Montana), gross weight (Colorado, Idaho).

In addition to those states listed in "Exhibit C," the State of Ohio also has a highway use tax of 1¢ to 2.5¢ per mile traveled within said state based upon the number of axles of the tractor-trailer unit using the highways. In the State of New York, highway use tax for certain commercial carriers is imposed at the rate of approximately 3¢ per mile, which sum is payable over and above the state fuel tax which is imposed in that state.

In those thirteen (13) states checked, single and two axle units are exempt from the payment of the highway fuel and use taxes imposed, except if fuel is actually purchased within those states.

31. That the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville.

32. Attached hereto, made a part hereof and identified as "Exhibit D," is a preliminary construction costs estimate of developments required and recommended by the consultants of the defendant, Evansville-Van-

derburgh Airport Authority District, Ralph H. Burke, Inc. of Park Ridge, Illinois, which report recommends the construction of a new terminal building and sufficient concrete aprons for nine gate positions to accommodate commercial airline aircraft, in addition to the construction of access roads and parking areas, extension of the northeast-southwest runway, land acquisition and the construction of a new cross-wind runway. The total estimated cost of said items to the Evansville-Vanderburgh Airport Authority District, after deductions of expected Federal participating funds is in the sum of \$6,901,000.00.

33. The capital improvement program recommended by the consultants of Evansville-Vanderburgh Airport Authority District, as summarized on "Exhibit D" attached, together with the terminal building improvement program which has, in fact, been adopted recently by the Board of Evansville-Vanderburgh Airport Authority District, as set forth in "Exhibit A" attached, is designed primarily for the safety, comfort and convenience of commercial airlines, its equipment, personnel and commercial airline passengers.

34. The adoption, initiation and fulfillment of the capital improvements recommended by the consultants of Evansville-Vanderburgh Airport Authority District and the retirement of the indebtedness created thereby will require more additional revenues than would be produced by Ordinance No. 33, assuming that said improvements are amortized over a fifteen (15) year period and that the forecast of probable passenger movement at Dress Memorial Airport is reasonably accurate.

35. The adoption, initiation and fulfillment of the capital improvements recommended by the consultants

of Evansville-Vanderburgh Airport Authority District will require more revenue than can be produced by the maximum tax levy now permitted by law to be levied by the Evansville-Vanderburgh Airport Authority District Act and will necessarily require additional revenues in excess of those which would be produced by Ordinance No. 33 in order to amortize the costs thereof. This paragraph of stipulation is based upon the present assessed valuation of property in Vanderburgh County and a schedule of amortization computed in a like manner to that set forth in Defendants' Submitted Facts No. 7

36. Ordinance No. 33 was adopted by the Board of Evansville-Vanderburgh Airport Authority District in accordance with the legal procedures required by Indiana law.

37. Commercial airline passengers, together with those persons who accompany or greet said passengers when they enplane or deplane at Dress Memorial Airport, constitute, numerically, the majority of persons who frequent the terminal and related facilities at Dress Memorial Airport. This paragraph of the stipulation is not intended to encompass or include the frequency of use of Dress Memorial Airport facilities nor the specific facilities actually used by persons frequenting Dress Memorial Airport.

38. If an enplaning air passenger refuses to pay the federal taxes imposed upon commercial airline ticket sales, the plaintiff airlines have two alternatives. One alternative is to enplane the passenger and pay the charge themselves, assuming the passenger has paid the air travel charges. The second alternative is to refuse to enplane the passenger.

s / Fred P. Bamberger
 Fred P. Bamberger
 s / Jeffrey R. Kinney
 Jeffrey R. Kinney
 s / John K. Mallory, Jr.
 John K. Mallory, Jr.
 s / Daniel B. Silver
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**EXHIBIT 4 TO PARTIES' STIPULATION
OF FACTS SUBMITTED TO VANDERBURGH
SUPERIOR COURT.**

(R. 553)

(Exhibits 1, 2 and 3 to the Parties' Stipulation have been omitted in printing. These exhibits are leases between the Respondent Airlines and the Petitioner Airport Authority. Exhibit 5 has been omitted in printing. It is a summary of general fund revenues of the Petitioner Airport Authority for the year 1967.)

**EVANSVILLE-VANDERBURGH AIRPORT
AUTHORITY DISTRICT
ORDINANCE NO. 33**

**AN ORDINANCE ESTABLISHING AND FIXING
A USE AND SERVICE CHARGE FOR ALL EN-
PLANING PASSENGERS UTILIZING AIRPORT
PREMISES AND FACILITIES.**

WHEREAS, the Acts of the Indiana General Assembly, 1969, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact

ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement,

equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

- (a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;
- (b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittances shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar (\$1.00),

less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include, nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District.

as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

s / Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:

s / Robert M. Leich
Robert M. Leich, Secretary

**EXHIBIT A TO PARTIES' STIPULATION OF
FACTS SUBMITTED TO VANDERBURGH
SUPERIOR COURT.**

(R. 558)

**EVANSVILLE (DRESS MEMORIAL AIRPORT)
PRELIMINARY COST ESTIMATE FOR
CONSTRUCTION AT TERMINAL BUILDING
BY STAGES**

Stage I Addition	S. F.	Unit Price	Amount
Baggage Claim Area (3 car rental areas, 80 feet baggage counters, lockers, and additional toilets for baggage claim area)	6,900	\$25.00	\$172,500.00
New Canopy	1,500	6.00	9,000.00
Sidewalks & Fences		L. S.	10,000.00
			\$191,500.00
Contingency & Engineering @ 20%			38,300.00
Subtotal Construction Cost			<u>229,800.00</u>

(Baggage Stage I) Road and Parking Lot Changes from Existing Construction Drawings			200,000.00
Remodeling Items (New Curtain wall and entrance)	1,500	40.00	60,000.00
Contingency & Engineering @ 20%			12,000.00
New Space for Allegheny	1,100	25.00	27,500.00
Contingency & Engineering @ 20%			5,500.00

Subtotal			\$305,000.00
Subtotal Stage I			<u>\$534,800.00</u>
Stage II Addition			
Airline Space (includes space for addi- tional airline operating space, enlarged ticket lobby, entrance, and	11,200	25.00	\$280,000.00

insurance areas)
Sidewalks & Fences

L. S. 10,000.00

\$290,000.00

Contingency & Engineering @ 20%

58,000.00

Subtotal Construction Cost
(Stage II)

\$348,000.00

December 5, 1968

**PRELIMINARY COST ESTIMATE FOR
CONSTRUCTION AT TERMINAL BUILDING
BY STAGES**

**Stage III Addition
& Remodel**

S.F.

Unit
Price

Amount

New Waiting Room Area 1,800

\$25.00

\$ 45,000.00

Sidewalks & Fences

L. S.

10,000.00

\$ 55,000.00

Contingency & Engineering @ 20%

11,000.00

Sub-Total Construction Costs
(Stage III)

\$ 66,000.00

Grand Total Construction Costs
(Three Stages)

\$948,800.00

Stage IV Additions (Future)

Future Canopy Area

Future Sidewalks & Fences

6,300

Enlarge Snack Shop Area

350

(The full Exhibit A to the Parties' Stipulation has been omitted in printing. The foregoing is the Summary portion of that Exhibit A.)

**SUMMARY OF EXHIBIT B TO PARTIES'
STIPULATION OF FACTS SUBMITTED
TO VANDERBURGH SUPERIOR COURT.**

(R. 566)

I. AIRPORT HISTORY—1929 TO DATE

- Since Dress Memorial Airport was opened in 1929, it has grown from 278 acres to 568 acres.
- \$6,650,668 have been invested in the public-owned assets at the Airport. Of the total investment, \$2,946,381 came from local sources and \$3,704,287 came from Federal grants.
- The Airport is a vital economic force in the community giving employment to 273 people in 19 separate businesses and government agencies with an annual payroll of \$1,177,786.
- The Airport today increasingly pays its own way in its annual operating budget. In 1961, the Airport Authority received an income of \$145,005 from Airport business tenants.

II. AIR TRAFFIC PROJECTIONS

- Population of the Evansville Primary Air Trade Area will increase from 199,313 in 1960 to 232,500 in 1970.
- Annual passenger volume will increase from 145,000 (both enplaned and deplaned) in 1960 to 268,000 by 1970, an increase of 85%.
- Air mail volume will increase by 45% and air cargo by 345%.
- Jet aircraft, the Caravelle and the Boeing 727, will start using the Airport by 1965 or 1966.
- The Northeast/Southwest runway, the Airport's principal runway, will have to be extended to a minimum effective length of 6,600 feet by 1966.

III. AIRPORT FACILITIES TODAY

- The existing physical facilities at the Airport

today are in excellent condition, particularly as a result of the major rehabilitation program undertaken in 1955.

- The needs of today are being adequately served by the existing airport runways and facilities although approaches to all runways are currently obstructed in varying degrees.

IV. FUNDAMENTAL DEFICIENCIES OF AIRPORT

The greatest deficiency of Dress Memorial Airport is the runway approach condition. Approaches to all runways are currently obstructed in varying degrees by railroad, highway, trees, or power lines.

—Northeast/Southwest Runway

The Northeast approach to the runway which is the Airport's principal runway as well as the instrument landing runway is obstructed by a railroad and three highway right-of-ways.

Because of these obstructions, airplanes on instrument landings have to operate on a 34:1 glide angle which is considerably below the Federal Aviation Agency's specifications of a 50:1 glide angle.

In order to clear all obstructions, airplanes on instrument landings have to land 600 feet "in" from the end of the runway. This causes the effective length of the runway to be reduced to 5,427 feet instead of its actual 6,027 feet.

This runway is short of the effective length of 6,600 feet required for jet air traffic.

Necessary corrective measures include the purchase of additional land, the re-routing of several roads and the re-location of the New York Central Railroad tracks somewhat to the east of the airport; in addition, an extension of the runway is necessary to meet jet requirements.

—**North/South Runway**

While the North/South runway has approach obstruction shortcomings, these unsatisfactory conditions are not critical based upon future plans for the use of this runway.

—**East/West Runway**

While the East/West runway has obstruction shortcomings now, they are not serious and will be remedied under future plans for this runway set forth in a subsequent section of this report.

—**Air Terminal Building**

While the airport terminal building satisfactorily meets the requirements of today, it is essential that expansion plans be formulated now to meet the requirements of 1970 and beyond.

—**Automobile Traffic Flow**

The present automobile entrance and exit are unsatisfactory as well as is the traffic flow. These conditions need to be remedied in the airport's future development program.

V. PROS AND CONS OF NEW AIRPORT SITE

—The development of an entirely new airport for the expanding "jet age" requirements at a site in the eastern part of the county on the

Vanderburgh-Warrick County Line would be an ideal solution.

- The cost of an entirely new airport, however, would be \$13,000,000 to \$16,000,000.
- Even with Federal grants of \$5,000,000 to \$7,000,000, the remaining funds to be financed locally are beyond the bonding capacity of the community.
- It is clear, therefore, that the only prudent move for the community is to correct existing deficiencies and expand the physical facilities of Dress Memorial Airport to meet the requirements of the future.

VI. PLANS FOR FUTURE UTILIZATION OF AIRPORT LAND

- Further hangar development for both commercial and private operators in the future will be allocated to the northwest corner of the Airport property.
- Tee-hangars and outside storage of aircraft will be allocated to the area around the Modification Center.
- Since Evansville Aviation Corporation's hangar is too close to the East/West runway by Federal standards, it will have to be relocated when the East/West runway is expanded.
- Land is allocated for motel development.
- Areas along the eastern border of expanded Airport property could be utilized for industrial sites.

VII. RECOMMENDED DEVELOPMENT PROGRAM FOR 1962-1971

- A development program costing \$4,481,000 over the next nine years is recommended to provide the community with a modern airport designed to meet near- and medium-term jet-age requirements as well as overcome serious operational obstruction shortcomings to runway approaches that now exist.
- The recommended \$4,481,000 development program costs considerably less than the \$13,000,000 to \$16,000,000 that would be required for the development of an entirely new airport site. Furthermore, this program is also considerably less costly than the \$9,427,000 program recommended by Leigh Fisher Associates, Inc. in a report submitted in February, 1962.
- The \$4,481,000 development program is programmed into three stages to meet financial limitations of the community.
- The key feature of the program is the acquisition of 370 acres to the east and northeast of the Airport for railroad relocation and runway expansion. It is indicated that the present New York Central Railroad trackage bordering existing airport property be moved east to the newly acquired 370 acres.
- The main Northeast/Southwest runway will be extended to the northeast by approximately 2,000 feet to a total length of 8,000 feet. This will provide for an effective runway length of 6,600 feet for instrument landings from the southwest. It will also provide for

the full 8,000 feet to be used on take-offs to the northeast and landings to the southwest.

—Because of the obstructions of the Whirlpool Plant to the south and the McCutchanville hills to the north, use of the North/South runway will be discontinued in 1969. It will continue, however, to be useful as a taxiway.

—The East/West runway will become the secondary runway of the Airport and will be extended by 2,170 feet to an over-all length of 5,670 feet as well as being widened to 150 feet from its present width of 100 feet.

—The Terminal Building expansion to meet future requirements is planned in three stages over the next nine-year period. It will be financed from the Airport Authority's existing Cumulative Building Fund.

—A new entrance-exit driveway into the terminal facilities from Highway 41 will be provided.

VIII. TIMETABLE FOR ACCOMPLISHMENT OF EACH DEVELOPMENT PHASE AND ESTIMATED COSTS

—The \$4,481,000 Airport development program is scheduled over the next nine-year period in three phases, 1962 through 1971.

—Phase I of the Airport development program is scheduled for accomplishment during 1962-1966 at a total estimated cost of \$2,620,000 as follows:

- a) Acquisition of 370 acres of adjacent land, \$740,000.

- b) New York Central Railroad relocation, \$268,000.
 - c) Road and highway relocation, \$217,000.
 - d) Extending the Northeast/Southwest runway to meet specifications of the Federal Aviation Agency, \$1,030,000.
 - e) First stage of Terminal Building expansion, \$165,000.
 - f) Construction of Maintenance Building-Crash-Fire Station, \$100,000.
 - g) Entrance road revision, \$100,000.
- Phase II of the Airport development program is scheduled for accomplishment during 1967-1969 at a total estimated cost of \$1,337,000 as follows:
- a) Acquisition of 10 acres of land, \$200,000.
 - b) Extension of East/West runway into Airport's secondary runway, \$854,000.
 - c) Second stage of Terminal Building expansion, \$213,000.
 - d) Relocation of hangars, \$70,000.

—Phase III of the Airport development program is scheduled for accomplishment during 1970-1971 at a total estimated cost of \$524,000 as follows:

- a) Third stage of Terminal Building expansion, \$194,000.
- b) Enlargement of aircraft ramp areas, \$330,000.

IX. FINANCIAL PROGRAMMING FOR DRESS MEMORIAL AIRPORT DEVELOPMENT

—The source of funds for the \$4,481,000 Air-

port development program are provided for as follows:

- a) \$338,000 from the ninth Federal Aid Project now in existence.
- b) \$572,000 for the Terminal Building expansion will come from the existing Cumulative Building Fund of the Airport Authority over the next nine-year period.
- c) Three local bond issues in the total amount of \$1,735,000 will be sold over the next nine-year period as follows: \$1,058,000 in 1963; \$562,000 in 1968; \$165,000 in either 1971 or 1972.
- d) Over the next nine-year period, Federal grants of \$1,785,000 will be received.

**EXHIBIT C TO PARTIES' STIPULATION OF
FACTS SUBMITTED TO VANDERBURGH
SUPERIOR COURT.**

(R. 636)

FUEL TAXES

State	Type Fuel	Tax Rate Per Gallon	Method of Collection
Alabama	Gasoline	.07	At time purchase-deficiency paid by report.
Alabama	Diesel	.07	At time purchase-deficiency paid by report.
Arizona	Diesel	.07	By report — no tax charged at time of purchase. However, if diesel unit does not have a permit, the port of entry will collect tax at $1\frac{3}{4}$ cent per mile.
California	Diesel	.07	At time of purchase-deficiency by report.
Colorado	Diesel	.06	By report — no tax charged at time of purchase. However, if diesel unit does not have a permit, the port of entry will collect tax using 4 MPG average.
Connecticut	Gasoline	.07	At time of purchase-deficiency by report.
Connecticut	Diesel	.07	At time of purchase-deficiency by report.
Georgia	Gasoline	.065	At time of purchase-deficiency by report.
Georgia	Diesel	.065	At time of purchase-deficiency by report.
*Iowa	Gasoline	.07	At time of purchase-deficiency by report.

State	Type Fuel	Tax Rate Per Gallon	Method of Collection
*Iowa	Diesel	.08	At time of purchase-deficiency by report.
Kansas	Gasoline	.05	At time of purchase-deficiency by report.
Kansas	Diesel	.07	At time of purchase-deficiency by report.
Kentucky	Gasoline	.09	.07 at time of purchase-deficiency by report plus surtax of .02 per gallon by report.
Kentucky	Diesel	.09	At time of purchase-deficiency by report.
Maine	Gasoline	.07	At time of purchase-deficiency by report.
Maine	Diesel	.07	At time of purchase-deficiency by report.
Maryland	Gasoline	.07	At time of purchase-deficiency by report.
Maryland	Diesel	.07	At time of purchase-deficiency by report.
Minnesota	Gasoline	.07	At time of purchase-deficiency by report.
Minnesota	Diesel	.07	At time of purchase-deficiency by report.
Missouri	Gasoline	.05	At time of purchase-deficiency by report.
Missouri	Diesel	.05	At time of purchase-deficiency by report.
Montana	Gasoline	.065	At time of purchase-deficiency by report.
Montana	Diesel	.09	At time of purchase-deficiency by report.

State	Type Fuel	Tax Rate Per Gallon	Method of Collection
*Nebraska	Gasoline	.075	At time of purchase-deficiency by report.
*Nebraska	Diesel	.075	At time of purchase-deficiency by report.
Nevada	Diesel	.06	By report - no tax charged at time of purchase. However, a diesel unit that does not have permit may have to pay tax at port of entry.
New Hampshire	Gasoline	.07	At time of purchase-deficiency by report.
New Hampshire	Diesel	.07	By report - no tax charged at time of purchase. However, a diesel unit that does not have a permit can operate on a 5.00 trip wire which covers tax liability.
*New Jersey	Gasoline	.06	At time of purchase-deficiency by report.
*New Jersey	Diesel	.06	At time of purchase-deficiency by report.
New Mexico	Diesel	.07	By report - no tax charged at time of purchase. However, if diesel unit does not have permit, the port of entry will collect tax on

State	Type Fuel	Tax Rate Per Gallon	Method of Collection fuel in tanks and vehicle may be required to pay tax at time of purchase.
*North Carolina	Gasoline	.07	At time of purchase-deficiency by report.
*North Carolina	Diesel	.07	At time of purchase-deficiency by report.
North Dakota	Gasoline	.06	At time of purchase-deficiency by report.
North Dakota	Diesel	.06	At time of purchase-deficiency by report.
Oklahoma	Gasoline	.0658	At time of purchase-deficiency by report.
Oklahoma	Diesel	.065	At time of purchase-deficiency by report.
*Pennsylvania	Gasoline	.07	At time of purchase-deficiency by report.
*Pennsylvania	Diesel	.07	At time of purchase-deficiency by report.
South Carolina	Gasoline	.07	At time of purchase-deficiency by report.
South Carolina	Diesel	.07	At time of purchase-deficiency by report.
South Dakota	Gasoline	.06	At time of purchase-deficiency by report.
South Dakota	Diesel	.07	At time of purchase-deficiency by report.
*Tennessee	Gasoline	.07	At time of purchase-deficiency by report.

State	Type Fuel	Tax Rate Per Gallon	Method of Collection
*Tennessee	Diesel	.08	At time of purchase-deficiency by report.
Texas	Gasoline	.05	At time of purchase-deficiency by report.
Texas	Diesel	.065	At time of purchase-deficiency by report.
Utah	Diesel	.06	At time of purchase. However, if a diesel unit does not have a permit, the tax will be collected at port of entry on fuel in tanks.
Virginia	Gasoline	.09	.07 at time of purchase-deficiency by report plus .02 gallon by report.
Virginia	Diesel	.09	.07 at time of purchase-deficiency by report plus .02 gallon by report.
Washington	Diesel	.09	By report - no tax charged at time of purchase. However, a diesel unit that does not have a permit will be required to purchase a \$20.00 trip permit. A portion of the 20.00 is refundable if the driver turns in pink copy with logs.

State	Type Fuel	Tax Rate Per Gallon	Method of Collection
West Virginia	Gasoline	.07	At time of purchase-deficiency by report.
West Virginia	Diesel	.07	At time of purchase-deficiency by report.
Wyoming	Diesel	.07	By report - no tax charged at time of purchase. However, a diesel unit that does not have a permit will be assessed tax at port of entry.

MILEAGE AND MISCELLANEOUS TAXES

State	Type Tax	Tax Rate	Method of Collection
Arizona	Gross Receipts	2.5%	By report — However, a vehicle not having proper permit may be assessed \$7.50 flat rate fee at port of entry.

Basis of Computations: Based on percent of revenues earned in state. Example: A \$900.00 shipment from Los Angeles, California, to Evansville, Indiana — total 2,029 miles. Percent of miles operated in Arizona — 18.5%. Apply 18.5% to \$900.00 gross revenue = \$166.50 net taxable revenue. Apply 2.5% tax rate to net taxable revenue — \$4.16 tax due. (Atlas reports on shipment basis. All shipments identified by registration numbers. We cannot identify by unit number.)

California	Inter-state Gross Receipts	1.5% By report. Tax computed same as Arizona using 1.5% tax rate (shipment basis).
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California	Intra-state Gross Receipts	By report. $\frac{1}{4}$ of 1% of gross intrastate revenue (shipment basis).
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Colorado	Ton Mile Tax	By report — X number of mills for each ton of cargo hauled each mile plus X number of mills per mile of unladen vehicle weight.
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Example of Colorado ton mile tax computation: Cargo weight 21,000 pounds times 400 miles = 840,00 pound miles divided by 2,000 (1 ton) = 42,200 ton miles times 2 mills = \$8.40 cargo tax. Unladen vehicle weight 28,513 pounds = 14.25 tons times $\frac{8}{10}$ of 1 mill = .0114 cost per mile times 400 miles = \$4.56 vehicle tax due. Total ton mile tax \$12.96.

Georgia	Highway Use Tax	By report — \$10.00 per round trip assessed as retaliatory tax against vehicles licensed in non-reciprocal states who assess a similar fee against Georgia licensed vehicles.
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Idaho	Fuel & Mileage Tax	X number of mills per mile for fuel and mileage tax depending on
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registered gross weight
of vehicle.

Example: A diesel powered vehicle registered at 60,000 pounds pays 23.80 mills per mile mileage tax and 10.60 mills per mile fuel tax. 414 miles = \$14.25 tax due. A gasoline powered unit pays 23.80 mills per mile only. 414 miles = \$9.85 plus the gasoline vehicle must purchase fuel in state to equal miles traveled. Tax rate is .06 per gallon.

Montana	Gross Receipt Tax	By report — $\frac{1}{2}$ of 1% of gross revenue earned in state. Computed same as Arizona gross receipt tax using $\frac{1}{2}$ of 1% tax rate (shipment basis)...
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Nevada	Mileage Tax	By report — .025 per mile.
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Example: 417 miles = \$10.43 tax due. Vehicle not having mileage tax plate will be required to purchase \$30.00 trip permit. It is possible in some cases to obtain refund on trip permit.

Oregon	Fuel & Mileage Tax	By report — combined tax depending on registered gross weight of vehicle.
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Example: Tax rate is 49 mills on 60,000 pounds registered gross weight at 300 miles = \$14.70 tax due.

Utah	Mileage Tax	By report — .015 per mile on 60,000 pounds gross weight.
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Example: 205 miles = \$3.08 tax due.

Vermont	Highway Use Tax	By report. \$5.00 per round trip assessed
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as a retaliatory tax against vehicles licensed in non-reciprocal states who assess a similar tax against Vermont licensed vehicles.

Wyoming Compensation
Fee

By report. $11\frac{1}{2}$ mills per ton mile of unladen vehicle weight or 40% of gross weight, whichever is higher.

Example: Vehicle with unladen weight of 30,000 pounds times 419 miles = 1,257,000 pound miles divided by 2,000 (1 ton) = 6,285 ton miles times $11\frac{1}{2}$ mills = \$9.43 tax due.

FUEL CONSUMPTION BASED ON 5 MPG

Use this chart to determine the amount of fuel to purchase in each state.

Estimated Travel	Gallons To Purchase
25 miles	5 gallons
50 miles	10 gallons
75 miles	15 gallons
100 miles	20 gallons
125 miles	25 gallons
150 miles	30 gallons
175 miles	35 gallons
200 miles	40 gallons
225 miles	45 gallons
250 miles	50 gallons
275 miles	55 gallons
300 miles	60 gallons
325 miles	65 gallons
350 miles	70 gallons
375 miles	75 gallons
400 miles	80 gallons
425 miles	85 gallons
450 miles	90 gallons
475 miles	95 gallons
500 miles	100 gallons
525 miles	105 gallons
550 miles	110 gallons
575 miles	115 gallons
600 miles	120 gallons
625 miles	125 gallons
650 miles	130 gallons
675 miles	135 gallons
700 miles	140 gallons

**EXHIBIT D TO PARTIES' STIPULATION OF
FACTS SUBMITTED TO VANDERBURGH
SUPERIOR COURT.**

(R. 645)

December 16, 1968

**PRELIMINARY CONSTRUCTION COST OF
DEVELOPMENTS REQUIRED AT DRESS
MEMORIAL AIRPORT BY THE YEAR 1975
TO 1980**

Description of Items	S.F.	Unit Price	Amount
1. New Terminal Building	90.00	25.00	\$2,250,000.00
Contingency & Engineering @ 20%			450,000.00
Sub-Total Terminal Building Cost			\$2,700,000.00
2. Apron for 9 Gates	160,000 S.Y.	12.00	1,920,000.00
Contingency for Engineering & 20%			384,000.00
			\$2,304,000.00
Less FAA Participation @ 50%			-1,152,000.00
Sub-Total Apron Costs			\$1,152,000.00
1. Access Road and Parking Area		L. S.	250,000.00
4. Extend NE-SW Runway	1,200'x150'	200.00	240,000.00
(Includes Lighting & Minor Drainage)			
Extend NE-SW Taxiway	1,200'x75'	100.00	120,000.00
			\$ 360,000.000
Contingency & Engineering @ 20%			72,000.00
			\$ 432,000.00
Less FAA Participation @ 50%			- 216,000.00
Sub-Total Runway & Taxiway Ex. Cost			\$ 216,000.00

6. Land Acquisition

	1,500.00/Acre		975,000.00
	650 Acres (Approx.)		
Acquire 30 Homes (Approx).	20,000/Home		600,000.00
Site Preparation	L. S.		400,000.00
Relocate Highway 57*	L. S.		500,000.00
			<u>\$2,475,000.00</u>
Less FAA Participation @ 50%		—	1,237,500.00
Sub-Total Land Costs			<u>\$1,237,500.00</u>

6. Construct New Crosswind Runway	7,200'x150'	200.00	1,440,000.00
(Includes Lighting & Minor Drainage)			
Construct Parallel Taxiway	7,200'x75'	100.00	720,000.00
			<u>\$2,160,000.00</u>
Contingency & Engineering @ 20%			432,000.00
			<u>\$2,592,000.00</u>
Less FAA Participation @ 50%		—	1,296,000.00
Sub-Total Crosswind R/W & T/ Cost			<u>\$1,296,000.00</u>
Total Cost of All Items . (1 Through 6)			<u>\$6,901,000.00</u>
for Airport Authority District			

*Highway may be relocated or runway and taxiway could be constructed as bridges.

TERMINAL BUILDING SPACE REQUIREMENTS FOR DRESS MEMORIAL AIRPORT

Description	Existing Installation	Need for Existing Demand	Future Requirements				
	(1968)	(1969)	1970	1975	1980	1985	1990
Annual Passenger Movements	360,000	360,000	480,000	765,000	1,025,000	1,320,000	1,500,000
Peak Hour Passenger Movements	232	232	300	459	578	702	750
Terminal Gates—Number (Probable)	4	4	8	9	9	10	11
Car Parking Spaces—Total (Public and Employee)	420	330	480	765	1,025	1,320	1,500
Public Parking	360	270	394	627	840	1,082	1,230
Employee Parking	60	60	86	138	185	238	270
Auto Rental (Ready) Spaces	25	40	51	76	92	109	113
Auto Rental (Storage) Spaces	170	170	228	340	428	519	555
Length of Ticket Counter—L.F.	48	100	120	150	60	190	200
Length of Baggage Claim Counter— L.F.	28	50	60	90	100	125	180
Waiting Room Seats (Number)	52	160	190	300	350	425	475
(Includes Holding Area Also)							
Airline Space							
Holding Area—S.F.	—	4,800	9,600	10,800	10,800	12,000	13,200
Ticket Counter S.F.	384	800	960	1,360	1,560	1,920	2,000
Operations S.F.	2,065	6,000	9,000	11,000	12,000	13,500	13,800
Baggage Claim S.F.	—	1,000	1,200	1,800	2,000	2,500	2,600
Storage Space S.F.	—	1,000	1,200	1,400	1,600	1,800	2,000
Maintenance S.F.	—	2,500	3,000	3,500	4,000	4,600	4,900
Cargo Space* S.F.	—	4,100	5,500	9,600	13,900	19,700	25,700
SUB-TOTAL AIRLINE SPACE	3,449	20,200	30,460	38,460	45,860	56,020	64,200
Other Space—1st Floor							
Ticket Lobby—S.F.	960	2,000	2,400	3,400	3,600	4,000	4,200
Waiting Room S.F.	576	2,800	3,300	4,600	5,500	7,000	7,500
T.V. Lounge S.F.	—	3000	360	420	480	540	600
Restaurant (Kitchen, Dinn. & Coffee Shop)	3,686	4,000	6,000	7,000	7,800	8,500	9,000
Bar—S.F.	984	1,000	1,000	1,000	1,200	1,500	2,000
Concession—S.F.	134	200	200	250	300	350	400
Insurance—S.F.	—	100	100	150	200	250	300
Public Toilets—S.F.	670	1,200	1,700	2,000	2,100	2,300	2,400
Barber Shop—S.F.	127	200	250	300	300	350	400
Rent-A-Car—S.F.	440	500	500	500	500	500	500
Mechanical & Equipment Room—S.F.	710	1,000	1,500	2,000	2,500	3,000	3,500

Description	Existing Installati (1968)	Need for Existing Demand		Future Requirements			
		(1969)	1970	1975	1980	1985	1990
Annual Passenger Movements	360,000	360,000	480,000	765,000	1,025,000	1,320,000	1,500,000
Peak Hour Passenger Movements	232	232	300	459	578	702	750
Terminal Gates—Number (Probable)	4	4	8	9	9	10	11
Car Parking Spaces—Total (Public and Employee)	420	330	480	765	1,025	1,320	1,500
Public Parking	360	270	394	627	840	1,082	1,230
Employee Parking	60	60	86	138	185	238	270
Auto Rental (Ready) Spaces	25	40	51	76	92	109	113
Auto Rental (Storage) Spaces	170	170	228	340	428	519	555
Length of Ticket Counter—L.F.	48	100	120	150	60	190	200
Length of Baggage Claim Counter— L.F.	28	50	60	90	100	125	180
Waiting Room Seats (Number)	52	160	190	300	350	425	475
(Includes Holding Area Also)							
Airline Space							
Holding Area—S.F.	—	4,800	9,600	10,800	10,800	12,000	13,200
Ticket Counter S.F.	384	800	960	1,360	1,560	1,920	2,000
Operations S.F.	2,065	6,000	9,000	11,000	12,000	13,500	13,800
Baggage Claim S.F.	—	1,000	1,200	1,800	2,000	2,500	2,600
Storage Space S.F.	—	1,000	1,200	1,400	1,600	1,800	2,000
Maintenance S.F.	—	2,500	3,000	3,500	4,000	4,600	4,900
Cargo Space* S.F.	—	4,100	5,500	9,600	13,900	19,700	25,700
SUB-TOTAL AIRLINE SPACE	3,449	20,200	30,460	38,460	45,860	56,020	64,200
Other Space—1st Floor							
Ticket Lobby—S.F.	960	2,000	2,400	3,400	3,600	4,000	4,200
Waiting Room S.F.	576	2,800	3,300	4,600	5,500	7,000	7,500
T.V. Lounge S.F.	—	3000	360	420	480	540	600
Restaurant (Kitchen, Dinn. & Coffee Shop)	3,686	4,000	6,000	7,000	7,800	8,500	9,000
Bar—S.F.	984	1,000	1,000	1,000	1,200	1,500	2,000
Concession—S.F.	134	200	200	250	300	350	400
Insurance—S.F.	—	100	100	150	200	250	300
Public Toilets—S.F.	670	1,200	1,700	2,000	2,100	2,300	2,400
Barber Shop—S.F.	127	200	250	300	300	350	400
Rent-A-Car—S.F.	440	500	500	500	500	500	500
Mechanical & Equipment Room—S.F.	710	1,000	1,500	2,000	2,500	3,000	3,500
SUB-TOTAL OTHER SPACE	8,287	13,300	17,310	21,620	24,480	28,290	30,800
Concourse—S.F.		8,000	16,000	18,000	18,000	20,000	22,000
Corridors, Vestibules, Entrance— Display Area—S.F.	1,577	3,690	4,900	5,950	6,850	7,900	8,400
TOTAL BUILDING—1st FLOOR ..	13,313	45,190	68,670	84,030	95,190	112,210	125,400

* This will be a separate building.

** Gates increased in a greater ratio than passengers, based upon greatly increased number of peak hour scheduled flights which will provide better service at Evansville.

**ORDER OF THE VANDERBURGH SUPERIOR
COURT GRANTING PETITION OF
WILLIAM F. WOOD TO INTERVENE
(R. 198)**

STATE OF INDIANA)

COUNTY OF VANDERBURGH)

SS:

IN THE SUPERIOR COURT OF VANDERBURGH
COUNTY

1969 TERM

DELTA AIRLINES, INC.)
EASTERN AIRLINES)
ALLEGHENY AIRLINES, INC.,)
and WILLIAM F. WOOD, on)
behalf of himself and all other)
persons similarly situated,)*Plaintiffs*)

NO. SC 68-328

vs.)

EVANSVILLE-VANDERBURGH)
AIRPORT AUTHORITY DIS-)
TRICT, KENNETH C. KENT,)
ELMO HOLDER, ROBERT M.)
LEICH, IAN F. LOCKHART,)
CLIFFORD K. ARDEN, and)
JAMES A. GEYER,)*Defendants*)**ORDER OF JANUARY 17, 1969
GRANTING PETITION TO INTERVENE**

Comes now WILLIAM F. WOOD and files herein his verified petition to intervene as a party plaintiff herein on behalf of himself and all other persons similarly situated, and the Court, having considered the same and having permitted defendants herein to object to

said petition to intervene, now finds that the said WILLIAM F. WOOD is a person who frequently enplanes at Dress Memorial Airport and is a member of that class of persons who would be subject to the payment of the \$1.00 charge imposed by Ordinance No. 33 of the defendant EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT; that the questions presented in this lawsuit are of common and general interest to many persons who will be subject to payment of said \$1.00 charge and that said persons constituting the class of enplaning air passengers upon commercial aircraft at Dress Memorial Airport are so numerous that it would be impracticable to bring them all before this Court as parties to this lawsuit; that the questions presented in this lawsuit involve legal rights of the petitioner and of the class of persons who would be subject to the payment of the said \$1.00 charge; that, by reason of said facts, the petitioner is directly interested in the subject matter and the disposition of this lawsuit and should be permitted to intervene as a party plaintiff herein on behalf of himself and all other persons similarly situated in order to fully protect and assert his interests and legal rights and the interests and legal rights of all other persons similarly situated; the Court further finds that said petition should be granted.

IT IS, THEREFORE, ORDERED that the petition of WILLIAM F. WOOD to intervene herein as a party plaintiff upon behalf of himself and all other persons similarly situated be, and the same is hereby, granted.

s / Benjamin E. Buente
Benjamin E. Buente
Judge, Superior Court of
Vanderburgh County

**ORDER OF THE VANDERBURGH SUPERIOR
COURT GRANTING PETITION OF
PAUL E. HATFIELD TO INTERVENE
(R. 225)**

STATE OF INDIANA)

COUNTY OF VANDERBURGH)

SS:

IN THE SUPERIOR COURT OF VANDERBURGH
COUNTY

1969 TERM

DELTA AIRLINES, INC.)

EASTERN AIRLINES)

ALLEGHENY AIRLINES, INC.,)

and WILLIAM F. WOOD, on)

behalf of himself and all other)

persons similarly situated)

Plaintiffs)

vs.)

No. SC 68-328)

EVANSVILLE-VANDERBURGH)

AIRPORT AUTHORITY DIS-)

TRICT, KENNETH C. KENT,)

ELMO HOLDER, ROBERT M.)

LEICH, IAN F. LOCKHART,)

CLIFFORD K. ARDEN, and)

JAMES A. GEYER,)

Defendants)**ORDER GRANTING PETITION TO INTERVENE**

Comes now PAUL E. HATFIELD and files herein his verified petition to intervene as a party defendant herein on behalf of himself and all other persons similarly situated, and the Court, having considered the same and having permitted plaintiffs herein to object to said petition to intervene, now finds that the said Paul E. Hatfield is a person who frequently enplanes as a passenger upon commercial aircraft at

Dress Memorial Airport and is a member of that class of persons who would be benefited by the application and enforcement of Ordinance No. 33 of the defendant, Evansville-Vanderburgh Airport Authority District; that the questions presented in this lawsuit are of common and general interest to many persons who will benefit by the revenue to be raised by said Ordinance and that said persons constituting the class of enplaning air passengers upon commercial aircraft at Dress Memorial Airport are so numerous that it would be impracticable to bring them all before this Court as parties to this lawsuit; that the questions presented in this lawsuit involve legal rights of the petitioner and of the class of persons who would be benefited by the application and enforcement of Ordinance No. 33 and the revenues to be raised thereby; that, by reason of said facts, the petitioner is directly interestd in the subject matter and the disposition of this lawsuit and should be permitted to intervene as a party defendant herein on behalf of himself and all other persons similarly situated in order to fully protect and assert his interests and legal rights and the interests and legal rights of all other persons similarly situated; the Court further finds that said petition should be granted.

IT IS, THEREFORE, ORDERED that the petition of Paul E. Hatfield to intervene herein as a party defendant upon behalf of himself and all other persons similarly situated be, and the same is hereby, granted.

s / Benjamin E. Buente
Benjamin E. Buente
Judge, Superior Court of
Vanderburgh County

**IN THE VANDERBURGH SUPERIOR COURT:
INTERVENING COMPLAINT OF WILLIAM F.
WOOD FOR INJUNCTION
(R. 265)**

(Title Omitted in Printing)

INTERVENING COMPLAINT FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION

PARAGRAPH I

Plaintiff WILLIAM F. WOOD, on behalf of himself and all other persons similarly situated, for his first cause of action alleges and says:

1. By order of the Superior Court of Vanderburgh County dated January 17, 1969, William F. Wood was granted leave to intervene herein as a party plaintiff on behalf of himself and all other persons similarly situated.

2. William F. Wood is a resident of Vanderburgh County, Indiana. During the year 1968, he enplaned as a passenger upon commercial aircraft at Dress Memorial Airport, Evansville, Indiana, approximately twenty-two times for destinations beyond the State of Indiana. During the year 1969, the said William F. Wood anticipates that he will enplane as an air passenger upon commercial aircraft at Dress Memorial Airport approximately fifteen times for destinations beyond the State of Indiana.

3. The defendant Evansville-Vanderburgh Airport Authority District is the owner and operator of Dress Memorial Airport in Vanderburgh County, State of Indiana, deriving its authority and power solely by statute, said statute being Burns' Ind. Ann. Stats. (1964 Repl.), Sections 14-1201 through 14-1235, said defendant Evansville-Vanderburgh Airport Authority District being expressly empowered by statute to sue and be sued in its own name, said statute being Burns' Ind. Ann. State. (1964 Repl.), Section 14-1215(1).

4. The defendant Kenneth C. Kent is a member and President of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

5. The defendant Elmo Holder is a member and Vice-President of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

6. The defendant Robert M. Leich is a member and Secretary of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

7. The defendant Ian F. Lockhart is a member of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

8. The defendant Clifford K. Arden is a member of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

9. The defendant James A. Geyer is the Airport Manager of Dress Memorial Airport and is the Treasurer of the Evansville-Vanderburgh Airport Authority District.

10. During the twelve (12) months preceding December 31, 1967, approximately 146,000 persons departed from Dress Memorial Airport upon commercial air carriers.

11. Enplaning air passengers constitute a minority of the users of Dress Memorial Airport. In 1967 there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights. In 1967, in addition to some 14,834 takeoffs and landings by commercial air carriers, there were 84,598 takeoffs and landings by other civil aircraft, both local and itinerant, each resulting in the use of the airport facilities by one or more persons. There are also other users of the airport facilities, such as persons visiting the bar and res-

taurant, persons using the freight facilities, observers and others, all hereinafter more fully specified.

12. On February 26, 1968, the Board of Directors of the Evansville-Vanderburgh Airport Authority District enacted an ordinance known as Ordinance No. 33 which levies a charge of \$1.00 on every enplaning commercial air passenger at Dress Memorial Airport and directs the commercial airlines operating at Dress Memorial Airport, as vendors of airline tickets, to collect said charge for the Evansville-Vanderburgh Airport Authority District, a copy of said Ordinance being attached hereto, made a part hereof, and marked "Exhibit A."

13. Said Ordinance No. 33 was to take effect on July 1, 1968.

14. Said Ordinance No. 33 will require all airline passengers departing Dress Memorial Airport to pay a charge of \$1.00 as a condition for the right to go aboard (enplane upon) commercial aircraft at Dress Memorial Airport, the commercial airlines being directed by the terms of said ordinance to collect said charge of \$1.00 and impliedly being directed to refuse to permit any airline passenger to board their aircraft unless said charge has been paid, Section 1 of said Ordinance imposing the charge of \$1.00 upon every enplaning air passenger and Section 2 imposing upon all airlines, their agents and employees, the responsibility of collecting said charge.

15. Said charge of \$1.00 is purportedly imposed as a fee for the use of airport facilities, but said charge is, in fact, not imposed upon a majority of the users of the airport facilities, to-wit:

a. persons using the airport facilities after arrival

- at said airport upon commercial aircraft;
- b. persons using the airport facilities upon arrival to or departure from Dress Memorial Airport by means of non-commercial aircraft;
 - c. persons and corporations using the airport facilities to transport and receive air freight shipments;
 - d. persons using the airport facilities when meeting or seeing-off airline passengers;
 - e. persons using the airport facilities for entertainment purposes in observing the arrival and departure of aircraft;
 - f. persons using the airport facilities incidental to the use of dining and bar facilities and other facilities located at said airport; and
 - g. other persons making use of the airport facilities who are not departing from said airport.

16. That the questions presented in this lawsuit are questions of common and general interest of many persons who will be subject to the aforesaid charge of \$1.00 to be paid for every enplanement upon commercial aircraft at Dress Memorial Airport, there having been approximately 146,000 enplanements upon commercial aircraft at Dress Memorial Airport during the 12 months preceding December 31, 1967. Said persons constituting the class of enplaning air passengers are numerous and it would be impracticable to bring them all before the Court as parties to this lawsuit.

17. Said Ordinance No. 33 will impose an undue and unreasonable burden upon the commerce among the several states and is in direct violation of Article 1,

Section 8, Clause 3, of the Constitution of the United States (Commerce Clause), in that:

- a. Said Ordinance is applied arbitrarily and unreasonably upon passengers traveling in interstate commerce without reference to the reasonable value of the services and facilities purportedly furnished said passengers, said charge being, in reality, a head tax imposed upon said interstate airline passengers as a condition of their departure from the State of Indiana and Vanderburgh County in that State via the Dress Memorial Airport.
 - b. Said Ordinance, by its application solely to a single class of users of said airport, which class consists primarily of passengers traveling in interstate commerce, creates an undue and unreasonable burden upon interstate commerce.
18. Said Ordinance Number 33 will impose an undue and unreasonable burden upon the commerce among the several states in direct violation of Article I, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause). The imposition of said illegal and unconstitutional charge will penalize passengers seeking to depart Evansville and the State of Indiana by air, will induce passengers entirely to forego travel between the States, or to travel by commercial aircraft from other airports, or to travel by means of conveyance other than commercial aircraft, all to the diminution and impairment of interstate commerce.
19. The failure of or refusal by plaintiff or other enplaning passengers at Dress Memorial Airport to pay the unconstitutional charge imposed by said ordinance will expose plaintiff and other enplaning pas-

sengers to criminal liability under the following provisions of the Indiana Statute creating the Evansville-Vanderburgh Airport Authority District, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor; and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234.)

20. That by reason of the foregoing, the plaintiff alleges that enforcement of said Ordinance No. 33 will, if not enjoined, cause great injury and damage to plaintiff and to all other persons similarly situated for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

21. If defendants are permitted to enforce said ordinance and collect the charges imposed thereby, the illegal and unconstitutional collection of said charges from airline passengers traveling in interstate commerce, or the refusal to pay said illegal charges, will, unless restrained and enjoined by this Court, expose plaintiff and other enplaning passengers to immediate and substantial injury, all in violation of the rights of plaintiff and other enplaning passengers for which they have no adequate remedy at law.

22. The deprivation of the constitutional rights of plaintiff and all other persons similarly situated and the illegal burden on interstate commerce are of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary injunction to

preserve the status quo and to prevent immediate injury to plaintiff and all other persons similarly situated and to interstate commerce in the United States.

23. Plaintiff will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary injunction.

WHEREFORE, plaintiff prays as follows:

A. That a temporary injunction be entered herein by this Court restraining and enjoining, until further order of this Court, the defendants named in the above and foregoing complaint and each of them, all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance No. 33 and from taking any steps to enforce the provisions of said Ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that commercial airlines operating at Dress Memorial Airport and their employees and agents, make any collection of the charges imposed by said Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against said airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
3. Instituting or causing to be instituted any criminal proceedings against the commercial airlines operating at Dress Memorial Airport or their employees and agents, for the non-collection of the charges imposed by said Ordinance No. 33.

4. Requiring, compelling, demanding, or otherwise requesting directly or indirectly, that any air passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passenger inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action whatsoever because of the nonpayment of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff costs in such amount as the Court may determine.

C. That this Court enter an order declaring said Ordinance No. 33 to be unconstitutional under Article 1, Section 8, Clause 3 of the Constitution of the United States.

D. That the plaintiff have such further relief in the premises as may be just and equitable.

WILLIAM F. WOOD, on behalf of
himself and all other persons sim-
ilarly situated

s / Fred B. Bamberger
Fred P. Bamberger

s / Jeffrey R. Kinney
Jeffrey R. Kinney

Of Counsel:

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Washington, D.C. 20036

Attorneys for Plaintiffs

PARAGRAPH II

Plaintiff William F. Wood, on behalf of himself and all other persons similarly situated, for his second cause of action alleges and says:

1. Plaintiff hereby adopts and realleges and incorporates by reference the allegations contained in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Paragraph I of his complaint as if herein set in full.

2. Said Ordinance No. 33 denies and restrains citizens of the United States from exercising their right and privilege to move unhampered, unimpeded, and without restriction or restraint to and through the various States of the United States and is in direct violation and contravention of the Privileges and Immunities, Equal Protection, and Due Process Clauses of Amendment Fourteen of the Constitution of the United States, said Ordinance and charge imposed thereby being applied arbitrarily and indiscriminatorily upon interstate airline passengers thereby denying them their constitutional rights and privileges and im-

munities as aforesaid by compelling them to pay, as a condition for their departure from the State of Indiana via Dress Memorial Airport into interstate commerce, said charge which has no reasonable basis in fact to the services and facilities purportedly furnished said passengers, said charge being, in reality, a head tax imposed upon said interstate airline passengers as a condition for their departure from the State of Indiana via Dress Memorial Airport.

3. The failure of or refusal by plaintiff or other enplaning passengers at Dress Memorial Airport to pay the unconstitutional charge imposed by said Ordinance will result in plaintiff and other enplaning passengers being denied transportation by plane, or, if allowed to enplane, will expose plaintiff and other enplaning passengers to criminal liability under the following provisions of the Indiana Statute creating the Evansville-Vanderburgh Airport Authority District, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

4. That by reason of the foregoing, the plaintiff alleges that enforcement of said Ordinance No. 33 will, if not enjoined, cause great injury and damage to plaintiff and other enplaning passengers for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

5. If defendants are permitted to enforce said Ordinance and collect the charges imposed thereby, the illegal and unconstitutional collection of said charges from airline passengers traveling in interstate commerce, or the refusal to pay said illegal charges, will, unless restrained and enjoined by this Court, expose plaintiff and other enplaning passengers to immediate substantial injury, all in violation of the rights of plaintiff and other enplaning passengers for which they have no adequate remedy at law.

6. If said Ordinance No. 33 is enforced, plaintiff and all other persons similarly situated who are citizens of the United States traveling in interstate commerce will be immediately inhibited and injured in their right to travel freely between the States and from place to place within the State of Indiana and will be placed in danger of arrest and prosecution for failure or refusal to pay the charge thereby imposed.

7. The magnitude of the violation of said passengers' rights secured to them by the Constitution of the United States and the resulting exposure of said passengers to grave and irreparable injury is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary injunction to preserve the status quo and to prevent immediate injury.

8. That plaintiff will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary injunction.

WHEREFORE, plaintiff prays as follows:

A. That a temporary injunction be entered herein

by this Court restraining and enjoining, until further order of this Court, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance No. 33 and from taking any steps to enforce the provisions of said Ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that commercial airlines operating at Dress Memorial Airport and their employees and agents, make any collection of the charges imposed by said Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against said airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
3. Instituting or causing to be instituted any criminal proceedings against the commercial airlines operating at Dress Memorial Airport or their employees and agents, for the noncollection of the charges imposed by said Ordinance No. 33.
4. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action whatsoever because of the nonpayment of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere

with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff costs in such amount as the Court may determine.

C. That this Court enter an order declaring said Ordinance No. 33 to be unconstitutional under the Privileges and Immunities, Equal Protection, and Due Process Clauses of the Constitution of the United States.

D. That the plaintiff have such further relief in the premises as may be just and equitable.

WILLIAM F. WOOD, on behalf of
himself and all other persons similarly situated.

s / Fred P. Bamberger
Fred P. Bamberger .

s / Jeffrey R. Kinney
Jeffrey R. Kinney

Of Counsel:

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Robert C. Barnard
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1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiff

PARAGRAPH III

Plaintiff William F. Wood, on behalf of himself and all other persons similarly situated, for his third cause of action alleges and says:

1. Plaintiff hereby adopts and realleges and incorporates by reference the allegations contained in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Paragraph I of his complaint as if herein set out in full.

2. Said Ordinance No. 33 imposes an arbitrary and discriminatory charge upon airline passengers departing Dress Memorial Airport and is in direct violation and contravention of the Equal Protection Clause of Amendment Fourteen of the Constitution of the United States and Article 1, Section 23, of the Constitution of the State of Indiana; said Ordinance imposing a charge upon enplaning airline passengers who are a minority class of users of the airport facilities purportedly for the use of airport facilities, but said Ordinance not imposing any charge upon deplaning passengers and other persons and corporations making like use of airport facilities either for transportation, air freight shipments, observation, dining and other uses, said charge additionally having no reasonable relation to the service and facilities purportedly furnished said passengers and being wholly arbitrary and unreasonable.

3. The failure of or refusal by plaintiff or other enplaning passengers at Dress Memorial Airport to pay the unconstitutional charge imposed by said Ordinance will expose plaintiff and other enplaning passengers to criminal liability under the following provisions of the

Indiana Statute creating the Evansville-Vanderburgh Airport Authority District, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." (Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

4. That by reason of the foregoing, the plaintiff alleges that enforcement of said Ordinance No. 33 will, if not enjoined, cause great injury and damage to plaintiff and other enplaning passengers at Dress Memorial Airport for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction.

5. If defendants are permitted to enforce said Ordinance and collect the charges imposed thereby, the illegal and unconstitutional collection of said charges from airline passengers traveling in interstate commerce, or the refusal to pay said illegal charges, will, unless restrained and enjoined by this Court, expose plaintiff and other enplaning passengers to immediate and substantial injury, all in violation of the rights of plaintiff and other enplaning passengers for which they have no adequate remedy at law.

6. The deprivation of the constitutional rights of plaintiff and all other persons similarly situated is of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary injunction to preserve the status quo and to prevent immediate injury to plaintiff and all other persons similarly situated.

7. Plaintiff will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary injunction.

WHEREFORE, plaintiff prays as follows:

A. That a temporary injunction be entered herein by this Court restraining and enjoining, until further order of this Court, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance No. 33 and from taking any steps to enforce the provisions of said Ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that commercial airlines operating at Dress Memorial Airport and their employees and agents, make any collection of the charges imposed by said Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against said airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
3. Instituting or causing to be instituted any criminal proceedings against the commercial airlines operating at Dress Memorial Airport or their employees and agents, for the noncollection of the charges imposed by said Ordinance No. 33.
4. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air passengers departing from Dress Memorial Air-

port make payments of the charges imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action whatsoever because of the nonpayment of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff costs in such amount as the Court may determine.

C. That this Court enter an order declaring said Ordinance No. 33 to be unconstitutional under the Equal Protection Clauses of Amendment Fourteen of the Constitution of the United States and Article 1, Section 23 of the Constitution of the State of Indiana.

D. That the plaintiff have such further relief in the premises as may be just and equitable.

WILLIAM F. WOOD, on behalf of
himself and all other persons similarly situated

s / Fred P. Bamberger
Fred P. Bamberger

s / Jeffrey R. Kinney
Jeffrey R. Kinney

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Washington, D.C. 20036
Attorneys for Plaintiff

PARAGRAPH IV

Plaintiff William F. Wood, on behalf of himself and all other persons similarly situated, for his fourth cause of action alleges and says:

1. Plaintiff hereby adopts and realleges and incorporates by reference the allegations contained in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Paragraph I of his complaint as if herein set out in full.

2. That the charge imposed by said Ordinance bears no reasonable relation to any facilities or services purportedly furnished to enplaning airline passengers and has no basis in fact, the charge of \$1.00 being wholly arbitrary and not taking into consideration the different and varied uses and non-uses of airport facilities, or the actual needs for revenue for the maintenance and operation of said airport.

3. That, additionally, said charge is wholly discriminatory and places the entire levy upon only a minority class of the persons using said airport facilities, de-

planing air passengers and other person and corporations using the airport facilities for non-commercial flights, air freight shipments, observations, dining and other uses not being required to pay any charge whatsoever.

4. That the statute which is purportedly the authority for the enactment of said Ordinance and the imposition of said charge (Burns' Ind. Ann. Stats. (1946 Repl.) Section 14-1215, Clauses 9 and 16) does not, in fact, contain legislative authorization for the enactment of an ordinance imposing an arbitrary and discriminatory charge upon enplaning airline passengers, said charge being, in reality, a wholly arbitrary, discriminatory, and unreasonable head tax levied against a minority class of airport users.

5. That, by reason of the foregoing, the Ordinance imposing said charge is wholly illegal as an ultra vires act of the defendant Evansville-Vanderburgh Airport Authority District, there being no statutory delegation by the General Assembly of the State of Indiana of the power to enact such an Ordinance and levy the charge imposed thereunder, said Ordinance Number 33 therefore being wholly void for want of jurisdiction.

6. That, additionally, the imposition of said charge which is in reality a tax imposed upon enplaning air passengers, who are a minority class of airport users, is in direct violation and contravention of Article 10, Section 1, of the Constitution of the State of Indiana, said tax not being provided for by the General Assembly of the State of Indiana, the power to impose such a tax not being delegated by the General Assembly of the State of Indiana, and the tax not being uniformly and equally imposed upon all persons who make use of facilities at Dress Memorial Airport.

7. The failure of or refusal by plaintiff or other enplaning air passengers at Dress Memorial Airport to pay the illegal charge imposed by said Ordinance will expose plaintiff and other enplaning passengers to criminal liability under the following provisions of the Indiana Statute creating the Evansville-Vanderburgh Airport Authority District, to-wit:

"Any person who violates any of the provisions of this act, regulation, or ordinance enacted pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10.00 and not more than \$300.00, or by imprisonment of not more than six months, or both." Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234).

8. That by reason of the foregoing the plaintiff alleges that enforcement of said Ordinance No. 33 will, if not enjoined, cause great injury and damage to plaintiff and to all other persons similarly situated for which there is no adequate remedy, at law or in equity, other than such as can be granted by this Court through the medium of injunction,

9. If defendants are permitted to enforce said Ordinance and collect the charges imposed thereby, the illegal and unconstitutional collection of said charges from airline passengers traveling in interstate commerce, or the refusal to pay said illegal charges, will, unless restrained and enjoined by this Court, expose plaintiff and other enplaning passengers to immediate and substantial injury, all in violation of the rights of plaintiff and other enplaning passengers for which they have no adequate remedy at law.

10. The deprivation of the rights of plaintiff and all

other persons similarly situated and the illegality of the conduct of the defendants are of such a grave and serious nature as to require the issuance forthwith by this Court of a temporary injunction to preserve the status quo and to prevent immediate injury to plaintiff and all other persons similarly situated.

11. That plaintiff will provide an undertaking with adequate surety in an amount to be fixed by this Court sufficient to recompense the defendants for any loss, expense, or damage caused by the improvident or erroneous issuance of a temporary injunction.

WHEREFORE, plaintiff prays as follows:

A. That a temporary injunction be entered herein by this Court restraining and enjoining, until further order of this Court, the defendants named in the above and foregoing complaint and each of them, and all employees and agents of the defendants, from:

1. Implementing the execution of said Ordinance No. 33 and from taking any steps to enforce the provisions of said Ordinance in any manner;
2. Requiring, compelling, demanding, or otherwise requesting that commercial airlines operating at Dress Memorial Airport and their employees and agents, make any collection of the charges imposed by said Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against said airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
3. Instituting or causing to be instituted any criminal proceedings against the commercial airlines operating at Dress Memorial Airport or their em-

ployees and agents, for the noncollection of the charges imposed by said Ordinance No. 33.

4. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payments of the charges imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action whatsoever because of the nonpayment of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

B. That upon final hearing a permanent injunction be issued granting the relief prayed for in Paragraph A of this prayer and granting the plaintiff costs, in such amount as the Court may determine.

C. That this Court enter an order declaring said Ordinance No. 33 to be illegal and void by reason of the non-existence of delegated legislative authority for the enactment of such Ordinance and unconstitutional as in violation of Article 10, Section 1, of the Constitution of the State of Indiana.

D. That the plaintiff have such further relief in the premises as may be just and equitable.

WILLIAM F. WOOD, on behalf of
himself and all other persons similarly situated

s / Fred P. Bamberger
Fred P. Bamberger

s / Jeffrey R. Kinney
Jeffrey R. Kinney

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Attorneys for Plaintiff

(Jurat Verification and Certificate of Service
Omitted in Printing)

**EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT**

ORDINANCE NO. 33

**AN ORDINANCE ESTABLISHING AND FIXING
A USE AND SERVICE CHARGE FOR ALL EN-
PLANING PASSENGERS UTILIZING AIRPORT
PREMISES AND FACILITIES.**

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 20, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact

ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by

all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

- (a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;
- (b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period..

Said remittance shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar (\$1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said air-

lines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include, nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and

effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:

/s/ Robert M. Leich
Robert M. Leich, Secretary

STATE OF INDIANA)
) SS:
 COUNTY OF VANDERBURGH)

I, the undersigned, Secretary of the Evansville-Vanderburgh Airport Authority District, do hereby certify that the attached Ordinance No. 33 consisting of four pages is a full, true, and correct copy of Ordinance No. 33 which was passed by the Board of Directors of the Evansville-Vanderburgh Airport Authority District on February 26, 1968.

I further certify that the attached Ordinance No. 33 is presently in force and will take effect on the first day of July, 1968.

/s/ Robert M. Leich
 Robert M. Leich, Secretary
 Evansville-Vanderburgh Airport
 Authority District

SUBSCRIBED and SWORN to before me, a Notary Public, in and for said County and State this 24th day of June, 1968.

/s/ Howard P. Trockman
 Howard P. Trockman
 Notary Public

My Commission expires:
 1-8-72

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF THE VANDERBURGH
SUPERIOR COURT
(R. 314)**

(Title Omitted in Printing)

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, pursuant to the written request of the plaintiffs heretofore filed prior to the hearing on the temporary injunction in this cause, now makes the following special findings of fact and conclusions of law, to-wit:

SPECIAL FINDINGS OF FACT

1. William F. Wood, a resident of Vanderburgh County, Indiana, enplaned as a passenger upon commercial aircraft at Dress Memorial Airport, Evansville, Indiana, approximately twenty-two times for destinations beyond the State of Indiana during the year 1968, said trips being for both business and pleasure. The said William F. Wood expects to enplane as a passenger upon commercial aircraft approximately fifteen times during the year 1969.

2. Based upon the number of enplaning passengers upon commercial aircraft at Dress Memorial Airport during the years previous to 1969, it can be reasonably expected that approximately 150,000 persons will enplane as passengers upon commercial aircraft at Dress Memorial Airport during the year 1969. All of said persons, with the exception of active military personnel, would be subject to the payment of the \$1.00 charge imposed by Ordinance No. 33 enacted by the defendant, Evansville-Vanderburgh Airport Authority District. Said class of enplaning passengers are numerous and it would be impracticable to bring them all before the Court as parties to this lawsuit. The questions presented in this lawsuit are of common and

general interest of many persons who would be subject to the payment of the \$1.00 charge imposed by said Ordinance No. 33.

3. Delta Air Lines, Inc., is a corporation organized under the laws of the State of Louisiana and is duly authorized to transact business in the State of Indiana.

4. Eastern Airlines is a corporation organized under the laws of the State of Delaware and is duly authorized to transact business in the State of Indiana.

5. Allegheny Airlines, Inc., successor to Lake Central Airlines, Inc., is a corporation organized under the laws of the State of Delaware and is duly authorized to transact business in the State of Indiana.

6. The Evansville-Vanderburgh Airport Authority District is the owner and operator of Dress Memorial Airport in Vanderburgh County, Indiana.

7. Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, and Clifford K. Arden are members of the Board of Directors of the Evansville-Vanderburgh Airport Authority District.

8. James A. Geyer is the airport manager of Dress Memorial Airport and is the Treasurer of the Evansville-Vanderburgh Airport Authority District.

9. Eastern Airlines and Allegheny Airlines, Inc. are commercial air carriers transporting passengers, freight, express, and mail to and from Dress Memorial Airport solely in interstate commerce. Delta Air Lines, Inc., is a commercial air carrier transporting passengers, freight, express, and mail to and from Dress Memorial Airport in interstate and intrastate commerce. Each of the plaintiff airlines are air carriers operating under Certificates of Public Convenience and Ne-

cessity issued by the Civil Aeronautics Board and are duly authorized pursuant to said Certificates to operate commercial aircraft and to enplane and deplane commercial air passengers, express, freight, and mail therefrom at Dress Memorial Airport between specified cities set forth in said Certificates. Each of the plaintiff airlines leases and operates facilities at Dress Memorial Airport for the purposes of providing commercial air passenger and freight service. The facilities operated by the plaintiff airlines include air passenger ticket counters, offices, storage space and other facilities.

10. Each of the plaintiff airlines has entered into lease agreements with the defendant, Evansville-Vanderburgh Airport Authority District, as the lessor, for facilities at Dress Memorial Airport, Evansville, Indiana. Each of said leases contain the following provisions.

"ARTICLE I — Premises. Lessor does hereby demise and let unto Lessee, and Lessee does hereby hire and lease from Lessor, the following premises and facilities, rights, licenses and privileges on and in connection with the property and improvements of Lessor on the Airport, all as more particularly hereinafter set forth:

(a) **Use of Airport.** The use by Lessee, its employees, passengers, guests, patrons and invitees, in common with other duly authorized users of the Airport and appurtenances, together with all facilities, improvements, equipment and services which have been or may hereafter be provided for common use at or in connection with said Airport.

(b) **Specific Rights at Airport.** In addition to all rights elsewhere granted in this agreement, Lessee

shall have the right to use the Airport for the following purposes:

(1) The operation of a transportation system by aircraft for the carriage of persons, property and mail, including all activities reasonably necessary to such operation (hereinafter referred to as 'air transportation');

(2) The landing; taking off, loading, unloading, repairing, maintaining, conditioning, servicing, parking or storing of aircraft or other equipment;

(3) The training at the Airport of personnel in the employ of or to be employed by Lessee and the testing of aircraft and other equipment, it being understood that such training and testing shall be incident to use of the Airport in the operation by Lessee of its air transportation system;

(4) The sale, disposal or exchange of Lessee's aircraft, engines, accessories, gasoline, oil, greases, lubricants and other equipment, fuel and supplies; provided, that this subsection shall not be construed as authorizing the conduct of a separate regular business by Lessee, but as permitting Lessee to enter into such transactions as incidents of its operation of an air transportation system, and, specifically, as permitting the sale or disposal of any article or goods used by, or bought for use by, the Lessee in connection with its operation of an air transportation system;

(5) The servicing by Lessee or its suppliers, at convenient locations, of aircraft and other equipment, by truck or otherwise, with gasoline, oil, grease and any other fuel or other supplies required by Lessee; such right shall include, without limiting

the generality hereof, the right to erect or install and maintain on the Airport adequate storage facilities for such gasoline, oil, greases and other fuel or supplies, at convenient locations, in accordance with insurance underwriters' standards, together with the necessary pipes, pumps, motors, filters and other appurtenances incidental to the use thereof; such structures and appurtenances to be and remain the severable property of Lessee. Provided, however, that it is specifically understood and agreed that if Lessee shall require the use or employment of Lessor's available land or improvements for the purpose of erecting and maintaining such storage facilities or other structures which may be required from time to time by Lessee, under this lease, this agreement shall not be construed so as to authorize Lessee to use such land without additional charges. In such event, Lessee agrees to negotiate with Lessor for the use of such land and Lessor shall endeavor to make the same available to Lessee upon reasonable rates, terms and conditions.

(6) The loading and unloading of persons, property and mail at the Airport by such motor vehicles or other means of conveyance as Lessee may desire or require in the operation of its air transportation system, with the right to designate the particular carrier or carriers who shall or may regularly transport Lessee's mail and cargo to and from the Airport;

(7) The purchase at the Airport of Lessee's requirements of gasoline, fuel, lubricating oil, grease, food and other passenger supplies, and any other materials and supplies from any person or company of Lessee's choice, and the making of

agreements with any person or company of Lessee's choice for work to be done for Lessee;

(8) The installation and operation of identifying signs on the leased premises, the general type and design of such signs to be subject to the approval of the Airport Manager; such approval, however, not to be arbitrarily withheld;

(9) The installation, maintenance and operation of such radio, communication, meteorological and aerial navigation equipment and facilities in, on and about the premises herein leased and said Airport as may be necessary or convenient in the opinion of the Lessee for its operations; provided, that the location of such equipment and facilities as might interfere with full and proper use of the Airport shall be subject to the approval of the Airport Manager, such approval not to be arbitrarily withheld;

(c) **Exclusive Space in the Administration Building.** For the term and at the rental hereafter stipulated, Lessee shall have the exclusive right to the following areas, all of which are more fully designated and delineated on Exhibit 'A' attached hereto and made a part hereof; to-wit:

_____ Square feet of interior Administration Building Office space, the location of which is indicated by Exhibit 'A' attached hereto and made a part hereof.

_____ square feet of exterior Administration Building Canopy space, the location of which is indicated by Exhibit 'A' attached hereto and made a part hereof.

_____ square feet of fuel tank farm facilities,

the location of which is indicated by Exhibit 'B' attached hereto and made a part hereof.

It being understood that Lessee has the right to the areas stipulated above for such uses as it may desire to make thereof in connection with or incidental to its operation of an air transportation system. The Lessee shall have the right and option at any time and from time to time during the term hereof and any extension or renewal, to lease, for the exclusive use of itself or of any air transport company subsidiary to or affiliated with it, any additional space at the Airport not necessary to the Lessor's operation of the Airport and at the time not leased to others, whether such space is adjacent to the space leased hereunder or otherwise, together with any or all rights, facilities, licenses and privileges appurtenant to such space and to the Airport, upon the same general terms and conditions as are herein established.

(d) **Parking Space.** The use by Lessee, its employees, in common only with the other air transport operators who may be lessees of space at the Airport and their employees of adequate vehicular parking space located as near as possible to the Administration Building, without charge to Lessee or to said employees.

(e) **Right of Access, Ingress and Egress.** The full and unrestricted rights of access, ingress and egress with respect to the premises outlined in (a) to (d) above, for Lessee, its employees, passengers, guests, patrons, invitees, suppliers of materials, and furnishers of service, its or their aircraft, equipment, vehicles, machinery and other property, without

charge to Lessee, or to said persons or property, other than a reasonable charge to passengers for automobile parking.***

"ARTICLE VIII — No Further Charges, Fees or Taxes. No rentals, fees, license, excise or operating taxes, tolls or other charges, except those herein expressly provided, shall be charged against or collected from directly or indirectly, the Lessee for the privileges of buying, selling, using, storing, withdrawing, handling, consuming or transporting materials or other supplies to, from or on the Airport; of making or performing agreements for work, materials or services at the Airport; of transporting, loading, unloading, or handling persons, property or mail to, from or on the Airport; or for any other of the premises, facilities, rights, licenses and privileges granted in this lease."

11. On June 28, 1968, Delta Air Lines, Inc., operated nine (9) regularly scheduled flights daily from Dress Memorial Airport, of which three (3) flights were direct flights to locations beyond the State of Indiana; five (5) flights terminated at locations beyond the State of Indiana with intermediate stops in Indiana; and one (1) flight terminated solely within the State of Indiana. In January, 1969, Delta Air Lines, Inc., was operating nine (9) regularly scheduled daily flights of which five (5) are direct flights to locations beyond the State of Indiana. Three (3) flights terminate at locations beyond the State of Indiana with intermediate stops in Indiana, and one (1) flight terminates in Indiana. During the twelve months preceding December 31, 1967, Delta Air Lines, Inc., carried 73,634 passengers enplaning at Dress Memorial Airport, a majority of whom were carried to destinations beyond the State

of Indiana.

12. On June 28, 1968, and continuing through the present time, Eastern Airlines has operated six (6) regularly scheduled flights daily from Dress Memorial Airport, all of which are direct flights to locations beyond the State of Indiana. During the twelve months preceding December 31, 1967, Eastern Airlines carried 59,400 passengers enplaning at Dress Memorial Airport, all of whom were carried to destinations beyond the State of Indiana.

13. On June 28, 1968, Lake Central Airlines, Inc., operated two (2) regularly scheduled flights daily from Dress Memorial Airport, both of which were direct flights to locations beyond the State of Indiana. In January, 1969, Allegheny Airlines, Inc., successor to Lake Central Airlines, Inc., continues to operate two (2) regularly scheduled flights daily from Dress Memorial Airport which are direct flights to locations beyond the State of Indiana. During the twelve months preceding December 31, 1967, Lake Central Airlines, Inc., carried 13,679 passengers enplaning at Dress Memorial Airport, all of which were carried to destinations beyond the State of Indiana.

14. During the twelve months preceding June 30, 1967, a total of 128,396 persons departed from Dress Memorial Airport upon scheduled and nonscheduled commercial air carriers.

15. In the year 1967, there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights at Dress Memorial Airport. In 1967, there were some 14,834 take-offs and landings by commercial air carriers at Dress Memorial Airport. In the same year, there were 84,598 take-offs and landings by

other civil and military aircraft, both local and itinerant, as follows:

A. Itinerant take-offs and landings	1,329
B. Itinerant civil take-offs and landings	49,959
C. Local military take-offs and landings	1,077
D. Local civil take-offs and landings	14,639

16. In 1966, 88.4% of the persons departing Dress Memorial Airport upon plaintiff airlines enplaned for ultimate destinations beyond the State of Indiana. At the present time, the percentage of persons departing Dress Memorial Airport upon commercial airlines for ultimate destinations beyond the State of Indiana is approximately 88% of all persons enplaning upon commercial aircraft at Dress Memorial Airport.

17. Dress Memorial Airport is the only commercial airport within an area of approximately 100 miles of Evansville, Indiana, with the exception of Owensboro, Kentucky, and Dress Memorial Airport serves a large portion of southeastern Illinois and northwestern Kentucky as well as southwestern Indiana. A substantial number of persons (estimated at approximately 40%) using Dress Memorial Airport are citizens of the States of Kentucky and Illinois, and their journeys originate in those states.

18. On February 26, 1968, the Board of the Evansville-Vanderburgh Airport Authority District enacted an ordinance known as Ordinance No. 33 which levies a charge of \$1.00 on every enplaning commercial air passenger at Dress Memorial Airport with exceptions for active military personnel and persons temporarily stopping at Dress Memorial Airport enroute to other destinations; said Ordinance imposes upon the commercial air carriers operating at Dress Memorial Air-

port the duty of collecting said \$1.00 charge; said Ordinance was to take effect on July 1, 1968.

19. The airport facilities at Dress Memorial Airport include but are not necessarily limited to the following facilities and services:

- (1) Main Terminal Building
 - air passenger service counters
 - air freight service counters and facilities
 - waiting room
 - rest rooms
 - dining room
 - bar
 - lunch counter
 - newsstand
 - barber shop
 - display areas
 - taxi stands
 - car rental counters
 - baggage facilities
 - telephone booths
- (2) Other Facilities
 - private hangar facilities
 - nonscheduled airline hangar facilities, office space, and waiting areas
 - entrance and exit facilities and sidewalks
 - parking lots
 - fuel storage areas
 - office space
 - runways and taxi-ways
 - approach lighting system
 - instrument lighting system

20. In addition to the use of one or more of the airport facilities and services by enplaning air passen-

gers, one or more of the foregoing facilities and services are also used by the following persons who constitute a majority of the users of facilities and services at Dress Memorial Airport but who are not subject to payment of the \$1.00 charge imposed by Ordinance No. 33 of the defendant, Evansville-Vanderburgh Airport Authority District, upon enplaning air passengers:

- a. persons using the airport facilities after arrival at the airport upon commercial aircraft;
- b. persons using the airport facilities and services upon arrival or departure from Dress Memorial Airport by means of noncommercial or nonscheduled aircraft (persons in this category may not ordinarily use the Main Terminal facilities upon arrival or departure but may do so to make use of service facilities located in the Main Terminal Building such as the restaurant, bar, barber shop, taxi stands, car rental stands, etc.);
- c. persons and corporations using the airport facilities to transport and receive air freight shipments;
- d. persons using airport facilities when meeting or seeing off air passengers;
- e. persons using the airport facilities for entertainment purposes and observing the arrival or departure of aircraft;
- f. persons using the airport facilities incidental to the use of dining and bar facilities and other public facilities and services located at said airport; and
- g. other persons making use of the airport facilities who are not departing from said airport.

21. In addition to the sale of tickets for departure (enplanement) from Dress Memorial Airport by plaintiff airlines at their Evansville, Indiana offices, a substantial number of airline tickets for departure from Dress Memorial Airport are sold by the following persons or corporations:

- a. plaintiff airlines through offices in Evansville, Indiana;
- b. plaintiff airlines through offices located in every state in the United States and other locations outside the United States;
- c. other air carriers through offices located in every state in the United States and locations outside the United States;
- d. travel agency offices located in every state in the United States and localities outside the United States;
- e. private persons and corporations located in every state in the United States and locations outside the United States who are authorized to write tickets upon plaintiff airlines.

22. Because many airline tickets for departures from Dress Memorial Airport are sold by persons and corporations other than the plaintiff airlines, the only effective and practical method by which the plaintiff airlines can be assured that every person boarding one of their aircraft at Dress Memorial Airport pays the \$1.00 charge imposed by Ordinance No. 33 is to publish said charge as part of or in addition to their tariffs and rates for departure from Dress Memorial Airport. Plaintiff airlines would incur costs and expenses in effecting tariff charges and providing nationwide

accounting and remittance procedures. The costs and expenses of effecting and operating said changes and procedures might or might not exceed the six percent (6%) collection fee permitted the air carriers under Ordinance No. 33.

23. Notwithstanding the name given to the \$1.00 charge imposed by Ordinance No. 33 nor the stated justification for the charge, the operating incidence of the charge is solely the act of enplaning upon a commercial airline at Dress Memorial Airport.

24. An air passenger intending to depart Dress Memorial Airport upon a commercial airline who purchased a ticket and paid the \$1.00 charge imposed by Ordinance No. 33 but who did not enplane would not be subject to the \$1.00 charge and would be entitled to a refund thereof. Persons arriving at Dress Memorial Airport from some other locality using a round trip ticket written at that other locality would be subject to the payment of the \$1.00 charge upon departure from Dress Memorial Airport regardless of the length of time between their arrival at Dress Memorial Airport and their departure therefrom; said \$1.00 charge would be paid at the time the round trip ticket is purchased.

25. A person who walks straight through the Terminal Building to a waiting commercial aircraft and boards thereon would be subject to the payment of the \$1.00 charge imposed by Ordinance No. 33.

26. A person who waits several hours in the Terminal Building at Dress Memorial Airport for his commercial flight and uses various facilities and services located in the Terminal Building prior to boarding his aircraft would be subject to the payment of the \$1.00 charge.

27. A person who makes use of terminal facilities and who enplanes upon and departs by means of a private aircraft at Dress Memorial Airport would not be subject to the payment of the \$1.00 charge imposed by Ordinance No. 33.

28. The Court takes judicial notice of the Federal Aviation Act codified at 49 U.S.C. Section 1301, et seq. and of the congressional intention therein expressed to regulate this country's air transportation system and to provide for a uniform system of rates and charges for commercial air transportation in the United States.

29. The Court takes judicial notice of Burns' Ind. Ann. Stats. (1964 Repl.), Section 14-1234 which imposes criminal penalties upon any person who fails to comply with an ordinance enacted by the Evansville-Vanderburgh Airport Authority District.

30. The Court takes judicial notice that most persons who might desire to contest the validity and constitutionality of the \$1.00 charge imposed by Ordinance No. 33 would be deterred therefrom because of the substantial litigation costs incident to the prosecution of a lawsuit of this type.

31. The plaintiff airlines and their employees would be subject to the criminal penalties imposed by Burns' Ind. Ann. Stats. (1964 Repl.) Section 14-1234 if they fail to collect the \$1.00 charge imposed by Ordinance No. 33 or otherwise fail to comply with the terms of Ordinance No. 33.

32. If a person holding a valid air ticket refuses to pay the \$1.00 charge for enplaning at Dress Memorial Airport, the plaintiff airlines have two alternatives. They can enplane said person and pay the charge them-

selves, or they can refuse to enplane said person in which case they could become subject to penal and civil sanctions prosecuted by the passenger or appropriate federal agencies under whose jurisdiction the airlines are subject.

33. Each of the plaintiff airlines has a direct interest in the subject matter of this lawsuit for the reason that each of their leases with the defendant Evansville-Vanderburgh Airport Authority District provides that the plaintiff Airlines, in consideration of rental, are granted the use of all facilities at Dress Memorial Airport for their passengers and guests and that the Evansville-Vanderburgh Airport Authority District will not impose any additional charge upon plaintiff airlines or their passengers for use of said facilities at Dress Memorial Airport.

34. The plaintiff airlines have an additional direct interest in the subject matter of this lawsuit for the reason that they are designated as collection agents of the \$1.00 charge imposed by Ordinance No. 33 and would, if said charge is invalid or unconstitutional be subject to numerous lawsuits for a refund of the charge collected by said Ordinance No. 33.

35. The plaintiff airlines have a direct interest in this lawsuit and will be directly and adversely affected by the imposition of Ordinance No. 33 because of their designation as collection agents for the charge imposed by the Ordinance and the resulting necessity to give nationwide notice to all sellers of their airline tickets and to set up appropriate accounting and remittance procedures, all of which will result in substantial expenditures.

36. Each of the plaintiff airlines has employees stationed at Dress Memorial Airport who travel both in

intrastate and interstate commerce by air on airline business. The transportation costs for said trips are paid by plaintiff airlines, and the plaintiff airlines would directly pay or reimburse their employees for the \$1.00 charge required by Ordinance No. 33 which would be imposed on the enplanement of their employees as passengers on commercial airlines for business trips for plaintiff airlines.

37. The \$1.00 charge imposed by Ordinance No. 33 is imposed in a discriminatory manner in that said charge bears no reasonable relationship with actual use or nonuse of facilities at Dress Memorial Airport and in that a majority of the users of facilities at Dress Memorial Airport are not subject to the payment of any equivalent charge for their use of facilities.

38. The \$1.00 charge imposed by Ordinance No. 33 does not otherwise have any valid or reasonable basis for its imposition only upon enplaning passengers upon commercial aircraft. With respect to persons traveling in interstate commerce, said charge is, in reality, a condition of departure from Dress Memorial Airport into interstate commerce.

39. The actual use of airport facilities by said class of enplaning air passengers is no different from use of airport facilities by other classes of persons not subject to the payment of said \$1.00 charge. The classes of persons who use airport facilities but who are not subject to the payment of the \$1.00 charge constitute a majority of users of facilities at Dress Memorial Airport.

40. All persons, including enplaning air passengers, using facilities at Dress Memorial Airport directly or

indirectly pay some type of use charge which is remitted to the defendant Evansville-Vanderburgh Airport Authority District for the use of various facilities and services at Dress Memorial Airport. Use of commercial service facilities at Dress Memorial Airport such as the restaurant, bar, and car rental agencies produce revenue for the Evansville-Vanderburgh Airport Authority District measured by the amount of use as reflected in gross income receipts of said service facility. Likewise, the use of runways, taxiways, landing aids and other similar facilities and devices by aircraft using Dress Memorial Airport is compensated for according to use by the imposition of landing fees and other charges. Enplaning air passengers do not make use of any significant facilities or services at Dress Memorial Airport which are not also used by a numerically larger group of other persons who are not subject to the payment of the \$1.00 charge imposed by Ordinance No. 33.

41. Some persons intending to enplane at Dress Memorial Airport might be deterred therefrom because of the payment of said \$1.00 charge imposed by Ordinance No. 33.

42. An air enplaning charge which, from practical necessity, is required to be collected at the time an air ticket is purchased regardless of the location of sale, would impose a substantial and direct burden upon interstate air commerce in the United States. The necessary accounting and remittance procedures as well as the necessary notice of the charge to every vendor of plaintiff airlines' tickets in the United States would impose a heavy burden upon the interstate air commerce conducted by plaintiff airlines to the detriment of their business, with resulting adverse affect upon

air commerce in the United States. In addition, the requirement of an additional charge for the act of enplaning, which charge has no valid or reasonable basis in fact but is, in reality, a per capita tax imposed upon the act of enplaning, constitutes a direct and substantial burden upon interstate air commerce by requiring the direct payment by interstate air passengers of an additional charge for air travel in the United States.

43. If many or all commercial airports in the United States created enplaning charges similar to the one imposed by Ordinance No. 33, but without any uniformity as to amount, interstate air commerce in the United States would be burdened to such an extent as to seriously impede and restrain air commerce among the various states.

CONCLUSIONS OF LAW

Upon the foregoing facts the Court concludes:

1. The law is with the plaintiffs.
2. Plaintiff William F. Wood is properly representative of the class in behalf of which he sues, and he has standing to maintain this action.
3. Each of the plaintiff airlines has standing to bring this lawsuit.
4. The \$1.00 charge imposed by Ordinance No. 33 upon passengers enplaning upon commercial aircraft at Dress Memorial Airport, not being related to or apportioned according to the use of facilities at Dress Memorial Airport, constitutes an unreasonable burden upon interstate commerce in the United States.
5. The \$1.00 charge imposed by Ordinance No. 33 is invalid as an intrusion by the defendant Evansville-Vanderburgh Airport Authority District upon the exclusive power of the Federal Government to regulate those aspects of interstate commerce requiring uniform national regulations.
6. The burden imposed on interstate commerce by the said \$1.00 charge required by Ordinance No. 33 is not authorized by the laws of the United States and is unlawful and unconstitutional under Article I, Section 8, Clause 3, of the Constitution of the United States.
7. The imposition of the \$1.00 charge required by Ordinance No. 33 constitutes an invalid and unlawful interference with and restraint upon the air passenger's right of freedom to travel in interstate commerce in the United States. This is especially true when con-

temptation is given to similar ordinances throughout the United States with varying levels of charges.

8. The \$1.00 charge imposed by Ordinance No. 33 is unlawful and unconstitutional under the Privileges and Immunities Clause of Amendment Fourteen of the United States Constitution.

9. The singling out of enplaning air passengers as a class upon whom the \$1.00 charge of Ordinance No. 33 is imposed is a wholly arbitrary and unreasonable classification which is unjustified by the undisputed and stipulated evidence in the case.

10. By reason of the discriminatory application of the \$1.00 charge imposed by Ordinance No. 33 upon enplaning air passengers who constitute a minority class of users of airport facilities at Dress Memorial Airport, the aforesaid charge is unlawful and unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

11. In addition, the discriminatory imposition of said \$1.00 charge is unlawful and unconstitutional under Article I, Section 23 of the Constitution of the State of Indiana.

12. To the extent that the aforesaid \$1.00 charge imposed by Ordinance No. 33 is asserted to be a service charge, the discriminatory application thereof, as established by the evidence in this cause, is without statutory legal authorization and is therefore an invalid and ultra vires act of the defendant Evansville-Vanderburgh Airport Authority District.

13. Plaintiffs have no adequate remedy at law.

14. If Ordinance No. 33 is enforced during the pen-

dency of this matter, plaintiffs would be exposed to greater legal harm than the defendants would be by the continuance in full force and effect of an injunction restraining the enforcement of Ordinance No. 33.

15. The legal issues raised by plaintiffs herein are of a substantial nature and warrant intervention by a court of equity to preserve the status quo pending final determination of the legal issues herein raised.

16. A temporary injunction should issue restraining and enjoining the named defendants and all employees and agents of the defendants from:

- a. Implementing the execution of said Ordinance No. 33 and from taking any steps to enforce the provisions of said Ordinance in any manner;
- b. Requiring, compelling, demanding, or otherwise requesting that plaintiff airlines, and their employees and agents, make any collection of the charges imposed by said Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against plaintiff airlines, and their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
- c. Instituting or causing to be instituted any criminal proceedings against plaintiff airlines, or their employees and agents for the noncollection of the charges imposed by said Ordinance No. 33;
- d. Otherwise taking any action, because of the noncollection of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the operation by plaintiff airlines of their businesses;
- e. Requiring, compelling, demanding, or otherwise

requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payment of the charges imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passenger inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action whatsoever because of the nonpayment of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

/s/ Benjamin E. Buente
Benjamin E. Buente
Judge, Superior Court of
Vanderburgh County

DATED: February 17, 1969

**DEFENDANTS' ANSWER TO PLAINTIFFS'
COMPLAINT FOR INJUNCTION IN THE
VANDERBURGH SUPERIOR COURT
(R. 365)**

(Title Omitted in Printing)

PARAGRAPH I OF ANSWER

Come now the defendants and for answer to Paragraph I of plaintiffs' complaint, allege and say:

1. Defendants admit the allegations contained in rhetorical paragraph 1 of Paragraph I of plaintiffs' complaint.

2. Defendants admit the allegations contained in rhetorical paragraph 2 of Paragraph I of plaintiffs' complaint.

3. Defendants admit the allegations contained in rhetorical paragraph 3 of Paragraph I of plaintiffs' complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph I of plaintiffs' complaint.

5. Defendants admit the allegations contained in rhetorical paragraph 5 of Paragraph I of plaintiffs' complaint.

6. Defendants admit the allegations contained in rhetorical paragraph 6 of Paragraph I of plaintiffs' complaint.

7. Defendants admit the allegations contained in rhetorical paragraph 7 of Paragraph I of plaintiffs' complaint.

8. Defendants admit the allegations contained in rhetorical paragraph 8 of Paragraph I of plaintiffs' complaint.

9. Defendants admit the allegations contained in

rhetorical paragraph 9 of Paragraph I of plaintiffs' complaint.

10. Defendants admit the allegations contained in rhetorical paragraph 10 of Paragraph I of plaintiffs' complaint.

11. Defendants admit that each of the plaintiff airlines is a commercial air carrier transporting passengers and commodities in interstate commerce, but defendants specifically deny that plaintiffs' engagement in interstate commerce exists solely by virtue of the authority granted to them by the Civil Aeronautics Board with respect to commercial air carrier transporting between Dress Memorial Airport and various other locations within and without the State of Indiana.

12. Defendants admit the allegations contained in rhetorical paragraph 12 of Paragraph I of plaintiffs' complaint.

13. Defendants admit the allegations contained in rhetorical paragraph 13 of Paragraph I of plaintiffs' complaint.

14. Defendants admit the allegations contained in rhetorical paragraph 14 of Paragraph I of plaintiffs' complaint.

15. Defendants admit the allegations contained in rhetorical paragraph 15 of Paragraph I of plaintiffs' complaint.

16. Defendants admit the allegations contained in rhetorical paragraph 16 of Paragraph I of plaintiffs' complaint.

17. Defendants admit the allegations contained in rhetorical paragraph 17 of Paragraph I of plaintiffs'

complaint, but assert, in connection therewith, that Dress Memorial Airport and its facilities are primarily maintained for the benefit of commercial airline passengers and that, while statistics may be maintained for the purpose of showing the number of enplaning air passengers as opposed to deplaning passengers at Dress Memorial Airport, such statistics do not reveal that such passengers constitute the same class of persons.

18. Defendants admit the allegations contained in rhetorical paragraph 18 of Paragraph I of plaintiffs' complaint.

20. While the defendants admit the allegations contained in rhetorical paragraph 20 of Paragraph I of plaintiffs' complaint, defendants would show unto the Court that the collection of said use and service charge established by Ordinance No. 33 and directing the plaintiff airlines, together with their agents and employees, with the responsibility of collecting the same, is no different than the collection of air tariff charges imposed by the plaintiff airlines or excise taxes imposed by the United States Government.

21. Defendants admit that the use and service charge of One Dollar (\$1.00) is imposed only upon enplaning passengers at Dress Memorial Airport as defined by Ordinance No. 33.

22. Defendants deny the allegations contained in rhetorical paragraph 22 of Paragraph I of plaintiffs' complaint.

23. Defendants admit the allegations contained in rhetorical paragraph 23 of Paragraph 5 of plaintiffs' complaint.

24. Defendants deny the allegations contained in

rhetorical paragraph 24 of Paragraph I of plaintiffs' complaint.

25. Defendants deny the allegations contained in rhetorical paragraph 25 of Paragraph I of plaintiffs' complaint.

26. Defendants deny the allegations contained in rhetorical paragraph 26 of Paragraph I of plaintiffs' complaint.

27. Defendants deny the allegations contained in rhetorical paragraph 27 of Paragraph I of plaintiffs' complaint.

28. Defendants deny the allegations contained in rhetorical paragraph 28 of Paragraph I of plaintiffs' complaint.

29. Defendants deny the allegations contained in rhetorical paragraph 29 of Paragraph I of plaintiffs' complaint.

30. Defendants deny the allegations contained in rhetorical paragraph 30 of Paragraph I of plaintiffs' complaint.

31. Defendants deny the allegations contained in rhetorical paragraph 31 of Paragraph I of plaintiffs' complaint.

32. Defendants deny the allegations contained in rhetorical paragraph 32 of Paragraph I of plaintiffs' complaint.

33. Defendants deny that the written undertaking of the plaintiffs in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiffs take nothing by their complaint; that plaintiffs be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorney for Defendants

PARAGRAPH II OF ANSWER

Come now the defendants and for answer to Paragraph II of plaintiffs' complaint allege and say:

1. Defendants hereby adopt, reallege and incorporate by reference the respective answers of said defendants to rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of Paragraph I of their answers as though fully written and contained herein.

2. Defendants deny the allegations contained in rhetorical paragraph 2 of Paragraph II of plaintiffs' complaint.

3. Defendants deny the allegations contained in rhetorical paragraph 3 of Paragraph II of plaintiffs' complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph II of plaintiffs' complaint.

5. Defendants deny the allegations contained in rhetorical paragraph 5 of Paragraph II of plaintiffs' complaint.

6. Defendants deny the allegations contained in rhetorical paragraph 6 of Paragraph II of plaintiffs' complaint.

7. Defendants deny the allegations contained in rhetorical paragraph 7 of Paragraph II of plaintiffs' complaint.

8. Defendants deny the allegations contained in rhetorical paragraph 8 of Paragraph II of plaintiffs' complaint.

9. Defendants deny the allegations contained in rhetorical paragraph 9 of Paragraph II of plaintiffs' complaint.

10. Defendants deny the allegations contained in rhetorical paragraph 10 of Paragraph II of plaintiffs' complaint.

11. Defendants deny that the written undertaking of the plaintiffs in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiffs take nothing by their complaint; that plaintiffs be required, further, to compensate the defendants for all losses, expenses and damages occasioned

to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorney for Defendants

PARAGRAPH III OF ANSWERS

Come now the defendants and for answer to Paragraph III of plaintiffs' complaint, allege and say:

1. Defendants hereby adopt, reallege and incorporate by reference the respective answers of said defendants to rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of Paragraph I of their answers as though fully written and contained herein.

2. Defendants deny the allegations contained in rhetorical paragraph 2 of Paragraph III of plaintiffs' complaint.

3. Defendants deny the allegations contained in rhetorical paragraph 3 of Paragraph III of plaintiffs' complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph III of plaintiffs' complaint.

5. Defendants deny the allegations contained in

rhetorical paragraph 5 of Paragraph III of plaintiffs' complaint.

6. Defendants deny the allegations contained in rhetorical paragraph 6 of Paragraph III of plaintiffs' complaint.

7. Defendants deny the allegations contained in rhetorical paragraph 7 of Paragraph III of plaintiffs' complaint.

8. Defendants deny that the written undertaking of the plaintiffs in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiffs take nothing by their complaint; that plaintiffs be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorney for Defendants

PARAGRAPH IV OF ANSWER

Come now the defendants and for answer to Paragraph IV of plaintiffs' complaint, allege and say:

1. Defendants hereby adopt, reallege and incorporate by reference the respective answers of said defendants to rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of Paragraph I of their answers as though fully written and contained herein.

2. Defendants deny the allegations contained in rhetorical paragraph 2 of Paragraph IV of plaintiffs' complaint.

3. Defendants deny the allegations contained in rhetorical paragraph 3 of Paragraph IV of plaintiffs' complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph IV of plaintiffs' complaint.

5. Defendants deny the allegations contained in rhetorical paragraph 5 of Paragraph IV of plaintiffs' complaint.

6. Defendants deny the allegations contained in rhetorical paragraph 6 of Paragraph IV of plaintiffs' complaint.

7. Defendants deny the allegations contained in rhetorical paragraph 7 of Paragraph IV of plaintiffs' complaint.

8. Defendants deny the allegations contained in rhetorical paragraph 8 of Paragraph IV of plaintiffs' complaint.

9. Defendants deny the allegations contained in rhetorical paragraph 9 of Paragraph IV of plaintiff's complaint.

10. Defendants deny the allegations contained in rhetorical paragraph 10 of Paragraph IV of plaintiffs' complaint.

11. Defendants deny the allegations contained in rhetorical paragraph 11 of Paragraph IV of plaintiffs' complaint.

12. Defendants deny that the written undertaking of the plaintiffs in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiffs take nothing by their complaint; that plaintiffs be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendant by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorney for Defendants

(Certificate of Service Omitted in Printing)

**DEFENDANTS' ANSWER TO INTERVENOR
WOODS' COMPLAINT FOR INJUNCTION IN
THE VANDERBURGH SUPERIOR COURT
(R. 357)**

**ANSWER TO INTERVENING COMPLAINT OF
WILLIAM F. WOOD FOR TEMPORARY IN-
JUNCTION AND PERMANENT INJUNCTION**

PARAGRAPH I OF ANSWER

Come now the defendants and for answer to Paragraph I of plaintiff, William F. Wood's, intervening complaint for temporary injunction and permanent injunction, allege and say:

1. Defendants admit the allegations contained in rhetorical paragraph 1 of Paragraph I of plaintiffs' complaint.

2. The defendants are without information as to the allegations contained in rhetorical paragraph 2 of Paragraph I of said plaintiff's intervening complaint.

3. Defendants admit the allegations contained in rhetorical paragraph 3 of Paragraph I of plaintiffs' complaint.

4. Defendants admit the allegations contained in rhetorical paragraph 4 of Paragraph I of plaintiffs' complaint.

5. Defendants admit the allegations contained in rhetorical paragraph 5 of Paragraph I of plaintiff's complaint.

6. Defendants admit the allegations contained in rhetorical paragraph 6 of Paragraph I of plaintiff's complaint.

7. Defendants admit the allegations contained in rhetorical paragraph 7 of Paragraph I of plaintiffs' complaint.

8. Defendants admit the allegations contained in rhetorical paragraph 8 of Paragraph I of plaintiffs' complaint.

9. Defendants admit the allegations contained in

rhetorical paragraph 9 of Paragraph I of plaintiffs' complaint.

10. Defendants admit the allegations contained in rhetorical paragraph 10 of Paragraph I of plaintiffs' complaint.

11. Defendants admit the allegations contained in rhetorical paragraph 11 of Paragraph I of plaintiffs' complaint, but assert, in connection therewith, that Dress Memorial Airport and its facilities are primarily maintained for the benefit of commercial airline passengers and that, while statistics may be maintained for the purpose of showing the number of enplaning air passengers as opposed to deplaning passengers at Dress Memorial Airport, such statistics do not reveal that such passengers constitute the same class of persons.

12. Defendants admit the allegations contained in rhetorical paragraph 12 of Paragraph I of plaintiffs' complaint.

13. Defendants admit the allegations contained in rhetorical paragraph 13 of Paragraph I of plaintiff's complaint.

14. While the defendants admit the allegations contained in rhetorical paragraph 14 of Paragraph I of plaintiff's complaint, defendants would show unto the Court that the collection of said use and service charge established by Ordinance No. 33 and directing the plaintiff airlines, together with their agents and employees, with the responsibility of collecting the same, is no different than the collection of air tariff charges imposed by the plaintiff airlines or excise taxes imposed by the United States Government.

15. Defendants admit that the use and service charge of One Dollar (\$1.00) is imposed only upon enplaning passengers at Dress Memorial Airport as defined by Ordinance No. 33.

16. While defendants admit that the questions presented in this lawsuit are those of common and general interest of many persons who will or may be subject to the use and service charge of One Dollar (\$1.00) as alleged in rhetorical paragraph 16 of Paragraph I of said plaintiff's intervening complaint, defendants deny that said intervening plaintiff represents that class of enplaning air passengers as plaintiffs in this cause of action and said defendants further deny that said class of enplaning passengers are those who would be interested as parties to this lawsuit.

17. Defendants deny the allegations contained in rhetorical paragraph 17 of Paragraph I of plaintiff's complaint.

18. Defendants deny the allegations contained in rhetorical paragraph 19 of Paragraph I of plaintiff's complaint.

19. Defendants deny the allegations contained in rhetorical paragraph 18 of Paragraph I of plaintiff's complaint.

20. Defendants deny the allegations contained in rhetorical paragraph 20 of Paragraph I of plaintiff's complaint.

21. Defendants deny the allegations contained in rhetorical paragraph 21 of Paragraph I of plaintiff's complaint.

22. Defendants deny the allegations contained in

rhetorical paragraph 22 of Paragraph I of plaintiff's complaint.

23. Defendants deny that the written undertaking of the plaintiff in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiff take nothing by his complaint; that plaintiff be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action, and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN
/s/ Howard P. Trockman
Howard P. Trockman
Attorney for Defendants

PARAGRAPH II OF ANSWER

Come now the defendants and for answer to Paragraph II of plaintiff, William F. Wood's, intervening complaint for temporary injunction and permanent injunction, allege and say:

1. Defendants hereby adopt, reallege and incorporate by reference the respective answers of said defendants to rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Paragraph I of their answers as though fully written and contained herein.

2. Defendants deny the allegations contained in rhetorical paragraph 2 of Paragraph II of plaintiff's complaint.

3. Defendants deny the allegations contained in rhetorical paragraph 3 of Paragraph II of plaintiff's complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph II of plaintiff's complaint.

5. Defendants deny the allegations contained in rhetorical paragraph 5 of Paragraph II of plaintiff's complaint.

6. Defendants deny the allegations contained in rhetorical paragraph 6 of Paragraph II of plaintiff's complaint.

7. Defendants deny the allegations contained in rhetorical paragraph 7 of Paragraph II of plaintiff's complaint.

8. Defendants deny that the written undertaking of the plaintiff in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiff take nothing by his complaint; that plaintiff be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the

costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN
/s/ Howard P. Trockman
Howard P. Trockman
Attorneys for Defendants

PARAGRAPH III OF ANSWER

Come now the defendants and for answer to Paragraph III of plaintiff, William F. Wood's, intervening complaint for temporary injunction and permanent injunction, allege and say:

1. Defendants hereby adopt, reallege and incorporate by reference the respective answers of said defendants to rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Paragraph I of their answers as though fully written and contained herein.

2. Defendants deny the allegations contained in rhetorical paragraph 2 of Paragraph III of plaintiff's complaint.

3. Defendants deny the allegations contained in rhetorical paragraph 3 of Paragraph II of plaintiff's complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph II of plaintiff's complaint.

5. Defendants deny the allegations contained in rhetorical paragraph 5 of Paragraph III of plaintiff's complaint.

6. Defendants deny the allegations contained in

rhetorical paragraph 6 of Paragraph III of plaintiff's complaint.

7. Defendants deny that the written undertaking of the plaintiff in this cause of action is sufficient to recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiff take nothing by his complaint; that plaintiff be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorneys for Defendants

PARAGRAPH IV OF ANSWER

Come now the defendants and for answer to Paragraph IV of plaintiff, William F. Wood's, intervening complaint for temporary injunction and permanent injunction, allege and say:

1. Defendants hereby adopt, reallege and incorporate by reference the respective answers of said defendants to rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8,

9, 10, 11, 12, 13, 14, 15 and 16 of Paragraph I of their answers as though fully written and contained herein.

2. Defendants deny the allegations contained in rhetorical paragraph 2 of Paragraph IV of plaintiff's complaint.

3. Defendants deny the allegations contained in rhetorical paragraph 3 of Paragraph IV of plaintiff's complaint.

4. Defendants deny the allegations contained in rhetorical paragraph 4 of Paragraph IV of plaintiff's complaint.

5. Defendants deny the allegations contained in rhetorical paragraph 5 of Paragraph IV of plaintiff's complaint.

6. Defendants deny the allegations contained in rhetorical paragraph 6 of Paragraph IV of plaintiff's complaint.

7. Defendants deny the allegations contained in rhetorical paragraph 7 of Paragraph IV of plaintiff's complaint.

8. Defendants deny the allegations contained in rhetorical paragraph 8 of Paragraph IV of plaintiff's complaint.

9. Defendants deny the allegations contained in rhetorical paragraph 9 of Paragraph IV of plaintiff's complaint.

10. Defendants deny the allegations contained in rhetorical paragraph 10 of Paragraph IV of plaintiff's complaint.

11. Defendants deny that the written undertaking of the plaintiff in this cause of action is sufficient to

recompense the defendants for any loss, expenses or damage caused by the issuance by this Court of a restraining order or injunction.

WHEREFORE, defendants pray that the Court declare Ordinance No. 33 valid and constitutional; that plaintiff take nothing by his complaint; that plaintiff be required, further, to compensate the defendants for all losses, expenses and damages occasioned to the defendants by reason of the issuance of the restraining order and temporary injunction herein; that the restraining order and temporary injunction heretofore issued in this cause of action be dissolved; for the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorneys for Defendants

(Certificate of Service Omitted in Printing)

**DEFENDANTS' COUNTERCLAIM AGAINST
PLAINTIFFS IN THE VANDERBURGH
SUPERIOR COURT
(R. 353)**

(Title Omitted in Printing)

COUNTERCLAIM

Comes now the defendant, Evansville-Vanderburgh Airport Authority District, and for counterclaim and cause of action against the plaintiffs, Delta Air Lines, Inc., Eastern Airlines, and Allegheny Airlines, Inc., alleges and says:

1. The defendant and counterclaimant, Evansville-Vanderburgh Airport Authority District, is the owner and operator of Dress Memorial Airport located in Evansville, Vanderburgh County, State of Indiana, said defendant being an Airport Authority District created by the Acts of the Indiana General Assembly, 1959, together with amendments thereto and other legislative amendments referred to therein, and being empowered and authorized thereunder to, among other things, enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from users of facilities and services located at said Airport and, further, to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Airport and to fix, charge and collect fees for privileges thereon.

2. Pursuant to said statutory authority, the defendant and counterclaimant, on February 26, 1968, by and through its Board of Directors, duly enacted and adopted an ordinance, known as Ordinance No. 33, which establishes a use and service charge of One Dollar (\$1.00) for each enplaning commercial air passenger at Dress Memorial Airport, as said term is defined by said Ordinance, and further directs the plaintiff airlines, together with their agents, servants and employees, to collect and remit the same, after deducting

six percent (6%) of all such amounts collected for the purpose of paying for the costs incurred by the plaintiff airlines in the collection of said use and service charge. A true copy of said Ordinance has been attached to plaintiffs' complaint and marked "Exhibit A."

3. Said Ordinance No. 33 was to take effect on July 1, 1968, but on said date, plaintiffs obtained a restraining order and, subsequently, a temporary injunction which wrongfully precludes the defendant from the proceeds which were to be derived from the application and enforcement of said Ordinance.

4. During the year 1967, there were 146,955 enplaning passengers at Dress Memorial Airport and, the number of enplaning passengers during the year 1968 and to the date of the filing of this counterclaim in the year 1969 has exceeded the monthly average of enplaning passengers during the year 1967. It is reasonably anticipated that, for the year 1969, the number of enplaning passengers at Dress Memorial Airport will approximate the sum of 175,000.

5. Plaintiffs' complaint is improperly brought, unfounded and without merit, said Ordinance No. 33 being a valid and constitutional use and service charge for enplaning passengers at Dress Memorial Airport, said Ordinance being only designed to defray, partially, the costs of maintaining facilities at Dress Memorial Airport for the comfort, convenience and safety of commercial airlines and their passengers.

6. The defendant, Evansville-Vanderburgh Airport Authority District, during each day that said restraining order and temporary injunction remains in force and effect, suffers great financial losses and is de-

prived of the use of the funds designed to be raised by said Ordinance No. 33 in order to improve the facilities at Dress Memorial Airport for the comfort, safety and convenience of said commercial airline passengers. In addition to said daily financial loss, the defendant has been required to retain counsel in order to uphold the validity and constitutionality of said Ordinance for which the defendant requests reasonable compensation.

WHEREFORE, defendant prays for judgment against the plaintiffs in such an amount as will duly compensate defendant in accordance with the terms and provisions of the use and service charge established by said Ordinance No. 33, together with reimbursement for reasonable attorneys' fees and expenses incurred in connection with this proceeding, the costs of this action and all other just and proper relief in the premises.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

*Attorneys for Defendant,
Evansville-Vanderburgh
Airport Authority District*

Defendant, Evansville-Vanderburgh Airport Authority District, hereby requests a trial by jury.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

(Certificate of Service Omitted in Printing)

**PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT IN THE VANDERBURGH
SUPERIOR COURT
(R. 2 384)**

(Title Omitted in Printing)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Come now the Plaintiffs and the intervening Plaintiff, by their attorneys Bamberger, Foreman, Oswald and Hahn and Cleary, Gottlieb, Steen and Hamilton and move this Court to enter summary judgment for the Plaintiffs and the intervening Plaintiff on the grounds that

- (1) the complaint herein and answers thereto;
 - (2) the complaint of the intervening Plaintiff herein and answers thereto;
 - (3) the joint stipulation of facts made and entered into by the parties hereto which, together with its exhibits, was jointly submitted to the Court herein as Joint Exhibit I for the Court's consideration on Plaintiffs' application for a temporary injunction, which stipulation and exhibits are part of the record in this cause; and
 - (4) The findings of fact and conclusions of law made by this Court on February 17, 1969, and incorporated and made a part of the order of this Court dated February 21, 1969,
- show that the Plaintiffs and the intervening Plaintiff are entitled to judgement as a matter of law.

/s/ Fred P. Bamberger

Fred P. Bamberger

/ / Jeffrey R. Kinney

Jeffrey R. Kinney

/s/ John K. Mallory, Jr.
John K. Mallory, Jr.

/s/ Daniel B. Silver
Daniel B. Silver

Attorneys for Plaintiffs

Of Counsel:

BAMBERGER, FOREMAN,
OSWALD AND HAHN
708 Hulman Building
Evansville, Ind. 47708

Robert C. Barnard
John K. Mallory, Jr.
CLEARY, GOTTLIEB, STEEN
AND HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

(Notice of Motion for Summary Judgment and Certificate of Service of Notice and Motion for Summary Judgment Omitted in Printing.)

**DEFENDANTS MOTION FOR
SUMMARY JUDGMENT IN THE
VANDERBURGH SUPERIOR COURT
(R. 289)**

(Title Omitted in Printing)

**DEFENDANTS' MOTION FOR A SUMMARY
JUDGMENT**

Come now all of the defendants by their attorneys, Newman, Trockman & Flynn, and move the Court to enter summary judgment for the defendants on the grounds that plaintiffs' complaint, as shown by the answer thereto and the Stipulated Facts of the parties, presents no genuine issue as to any material fact and that the defendants are entitled to a summary judgment as a matter of law.

NEWMAN, TROCKMAN & FLYNN

/s/ Howard P. Trockman

Howard P. Trockman

Attorneys for Defendants

(Notice of Motion for Summary Judgment and Certificate of Service of Notice and Motion for Summary Judgment Omitted in Printing.)

**JUDGMENT OF THE VANDERBURGH
SUPERIOR COURT GRANTING PLAINTIFFS
A PERMANENT INJUNCTION AGAINST
DEFENDANTS
(R. 391)**

COUNTY OF VANDERBURGH)
 STATE OF INDIANA) SS:
)

**IN THE SUPERIOR COURT OF VANDERBURGH
 COUNTY**

1969 TERM

DELTA AIR LINES, INC.)
 EASTERN AIRLINES,)
 ALLEGHENY AIRLINES, INC.,)
 and WILLIAM F. WOOD, on)
 behalf of himself and all other)
 persons similarly situated,)
Plaintiffs)

vs.)

No. SC 68-328)

EVANSVILLE-VANDERBURGH)
 AIRPORT AUTHORITY DIS-)
 TRICT, KENNETH C. KENT,)
 ELMO HOLDER, ROBERT M.)
 LEICH, IAN F. LOCKHART,)
 CLIFFORD K. ARDEN, JAMES)
 A. GEYER, and PAUL E.)
 HATFIELD, on behalf of himself)
 and all other persons similiary)
 situated,)
Defendants)

**NUNC PRO TUNC JUDGMENT
 ENTRY FOR MAY 8, 1969**

Come now the Plaintiffs herein and the intervening
 Plaintiff herein by their attorneys, Bamberger, Fore-

man, Oswald, and Hahn and Cleary, Gottlieb, Steen and Hamilton, and file their joint motion for summary judgment. And come now the Defendants herein and the intervening Defendant herein by their counsel, Howard P. Trockman, of Newman, Trockman, and Flynn and file their cross-motion for summary judgment.

And now, said motion of Plaintiffs and the intervening Plaintiff and said cross-motion of Defendants and intervening Defendant having come on for hearing on the 8th day of May, 1969, and the Court having heard arguments thereon, and having considered the Plaintiffs' complaint and the answers thereto; the complaint of the intervening Plaintiff and answers thereto; the joint stipulation of facts made and entered into by the parties hereto which, together with its exhibits, was jointly submitted to the Court herein as Joint Exhibit I for the Court's consideration on Plaintiffs' application for a temporary injunction, which stipulation and exhibits are part of the record in this cause; and the findings of fact and conclusions of law made by this Court on February 17, 1969, and incorporated into and made a part of the order of this Court dated February 21, 1969, and the Court having found that the Defendant Evansville-Vanderburgh Airport Authority District has failed to plead over after a demurrer was sustained to its counterclaim filed herein on March 24, 1969, and the Court being of the opinion and so finding that no genuine issue as to any material facts exists, the Court finds that the Plaintiffs and the intervening Plaintiff are entitled to summary judgment as a matter of law and for the reasons set forth in the Conclusions of Law made by this Court on February 17, 1969, and made a part of the Order of this Court dated February 21, 1969, which

Conclusions of Law are as follows:

a. Plaintiff William F. Wood is properly representative of the class in behalf of which he sues, and has standing to maintain this action.

b. Each of the plaintiff airlines has standing to bring this lawsuit.

c. The \$1.00 charge imposed by Ordinance No. 33 upon passengers enplaning upon commercial aircraft at Dress Memorial Airport, not being related to or apportioned according to the use of facilities at Dress Memorial Airport, constitutes an unreasonable burden upon interstate commerce in the United States.

d. The \$1.00 charge imposed by Ordinance No. 33 is invalid as an intrusion by the defendant Evansville-Vanderburgh Airport Authority District upon the exclusive power of the Federal Government to regulate those aspects of interstate commerce requiring uniform national regulations.

e. The burden imposed on interstate commerce by the said \$1.00 charge required by Ordinance No. 33 is not authorized by the laws of the United States, and is unlawful and unconstitutional under Article I, Section 8, Clause 3, of the Constitution of the United States.

f. The imposition of the \$1.00 charge required by Ordinance No. 33 constitutes an invalid and unlawful interference with and restraint upon the air passenger's right of freedom to travel in interstate commerce in the United States. This is especially true when contemplation is given to similar ordinances throughout the United States with varying levels of charges.

g. The \$1.00 charge imposed by Ordinance No. 33 is unlawful and unconstitutional under the Privileges and Immunities Clause of Amendment Fourteen of the United States Constitution.

h. The singling out of enplaning air passengers as a class upon whom the \$1.00 charge of Ordinance No. 33 is imposed is wholly arbitrary and unreasonable classification which is unjustified by the undisputed and stipulated evidence in the case.

i. By reason of the discriminatory application of the \$1.00 charge imposed by Ordinance No. 33 upon enplaning air passengers who constitute a minority class of users of airport facilities at Dress Memorial Airport, the aforesaid charge is unlawful and unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

j. In addition, the discriminatory imposition of said \$1.00 charge is unlawful and unconstitutional under Article I, Section 23 of the Constitution of the State of Indiana.

k. To the extent that the aforesaid \$1.00 charge imposed by Ordinance No. 33 is asserted to be a service charge, the discriminatory application thereof, as established by the evidence in this cause, is without statutory legal authorization and is therefore an invalid and ultra vires act of the defendant Evansville-Vanderburgh Airport Authority District.

1. Plaintiffs have no adequate remedy at law. The Court finds the Plaintiffs and intervening Plaintiff are entitled to judgment perpetually enjoining the Defendants from:

- a. Implementing the execution of Ordinance No. 33 enacted by the Directors of the Evansville-Vanderburgh Airport Authority District on February 26, 1968, and from taking any steps to enforce the provisions of said Ordinance in any manner;
- b. Requiring, compelling, demanding, or otherwise requesting that Delta Air Lines, Inc., Eastern Airlines, and Allegheny Airlines, Inc., and their employees and agents, make any collection of the charges imposed by the aforesaid Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against said airlines or their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
- c. Instituting or causing to be instituted any criminal proceedings against the aforesaid airlines, or their employees and agents for the noncollection of the charges imposed by said Ordinance No. 33;
- d. Otherwise taking any action, because of the noncollection of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the operation by the aforesaid airlines of their businesses;
- e. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any airline passengers departing from Dress Memorial Airport make payment of the charge imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action

whatsoever because of the nonpayment of said charges imposed by said Ordinance No. 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the joint motion of Plaintiffs herein and the intervening Plaintiff herein for summary judgment be, and the same is, hereby granted.

IT IS FURTHER ORDERED that the cross-motion for summary judgment filed herein by the Defendants be, and the same is, hereby overruled.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the Defendants, Evansville-Vanderburgh Airport Authority District, Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, Clifford K. Arden, James A. Geyer and their successors and assigns be, and they are hereby, perpetually enjoined from:

- a. Implementing the execution of Ordinance No. 33 enacted by the Directors of the Evansville-Vanderburgh Airport Authority District on February 26, 1968, and from taking any steps to enforce the provisions of said Ordinance in any manner;
- b. Requiring, compelling, demanding, or otherwise requesting that Delta Airlines, Inc., Eastern Airlines, and Allegheny Airlines, Inc., and their employees and agents, make any collection of the charges imposed by the aforesaid Ordinance No. 33 and from otherwise taking any action or causing any action to be taken against said airlines or

- their employees and agents, inconsistent with the order of this Court that said Ordinance No. 33 not be enforced;
- c. Instituting or causing to be instituted any criminal proceedings against the aforesaid airlines, or their employees and agents for the noncollection of the charges imposed by said Ordinance No. 33;
 - d. Otherwise taking any action, because of the noncollection of said charges imposed by Ordinance No. 33, direct or indirect, which would in any manner interfere with the operation by the aforesaid airlines of their businesses.
 - e. Requiring, compelling, demanding, or otherwise requesting, directly or indirectly, that any air passengers departing from Dress Memorial Airport make payment of the charges imposed by said Ordinance No. 33; from otherwise taking any action or causing any action to be taken against any air passengers inconsistent with the order of this Court that said Ordinance No. 33 not be enforced; and from taking any action whatsoever because of the nonpayment of said charges imposed by said Ordinance No. 33, direct or indirect, which would in any manner interfere with the use of the airport facilities by said passengers and their departures from Dress Memorial Airport.

The Court now enters final judgment for the Plaintiffs and intervening Plaintiff herein, and orders that the Defendants and intervening Defendant shall have ninety (90) days from the date hereof within which to perfect appeal to the Indiana Supreme Court.

IT IS FURTHER ORDERED that the Plaintiffs herein and the intervening Plaintiff herein have judg-

ment for costs against the Defendant, Evansville-Vanderburgh Airport Authority District only but costs are hereby waived and suspended.

/s/ Benjamin E. Buente
Benjamin E. Buente
Judge, Superior Court of
Vanderburgh County

**OPINION OF THE SUPREME COURT OF
INDIANA ON APPEAL FROM THE SUPERIOR
COURT OF VANDERBURGH COUNTY.**

IN THE
SUPREME COURT OF INDIANA

EVANSVILLE-VANDEBURGH)
AIRPORT AUTHORITY DIS-)
TRICT, KENNETH C. KENT,)
ELMO HOLDER, ROBERT M.)
LEICH, IAN F. LOCKHART,)
CLIFFORD K. ARDEN, JAMES)
A. GEYER and PAUL E.)
HATFIELD, On Behalf of Him-)
self and All Others Persons)
Similarly Situated,)

Appellants,)

v.)

No. 869 S 179

DELTA AIRLINES, INC.,)
EASTERN AIRLINES,)
ALLEGHENY AIRLINES,)
INC., and WILLIAM F. WOOD,)
On Behalf of Himself and All)
Other Persons Similarly)
Situated,)

Appellees.)

APPEAL FROM THE SUPERIOR COURT OF
VANDERBURGH COUNTY

Honorable Benjamin E. Buente, Judge

DeBRULER, J.

This is an appeal from a final judgment in the Vanderburgh County Superior Court granting appellees

a permanent injunction against the enforcement of Evansville-Vanderburgh Airport Authority District's Ordinance No. 33, which ordinance establishes a charge of \$1.00 for each passenger (with certain exceptions) enplaning a commercial aircraft at Dress Memorial Airport, Evansville, Indiana. The other appellants are either directors or officers of the appellant Airport Authority District.

On February 26, 1968, appellants enacted Ordinance No. 33, intended to become effective July 1, 1968, which levied a charge of \$1.00 on enplaning commercial air passengers at Dress Memorial Airport. The ordinance, in pertinent part, reads:

"Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

* * *

"Section 4. The term 'each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport' shall not include nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

"Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate

fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof."

The appellee airlines are commercial air carriers transporting passengers, freight, express and mail to and from Dress Memorial Airport in interstate commerce under authorization of the Civil Aeronautics Board. Each of the appellee airlines leases and operates facilities at Dress Memorial Airport for the purposes of providing commercial air passenger and freight service. The appellees sought to enjoin the enforcement of Ordinance No. 33 on the grounds it was unconstitutional and illegal in several respects. In granting appellees a permanent injunction the trial court made eleven conclusions of law, but in the view we take of this case it is necessary to discuss only the following one:

"The \$1.00 charge imposed by Ordinance No. 33 upon passengers enplaning upon commercial aircraft at Dress Memorial Airport, not being related to or apportioned according to the use of facilities at Dress Memorial Airport, constitutes an unreasonable burden upon interstate commerce in the United States."

Appellants' argument on appeal is that that conclusion is erroneous and the \$1.00 tax is a valid service tax for the use of facilities provided by appellants at Dress Memorial Airport and thus not an unreasonable burden on interstate commerce.

There is no question that the incidence of the tax imposed by Ordinance No. 33 falls on interstate com-

merce. The tax is on the act of enplanement on one of the appellee airlines and in 1966, 88.4% of the persons departing Dress Memorial Airport upon the appellee airlines enplaned for ultimate destinations beyond the State of Indiana.

The basic principle governing the power of a state to levy a tax affecting interstate commerce is that such a tax "can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bellas Hess, Inc. v. Dept. of Revenue* (1967), 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505; *Freeman v. Hewitt* (1946), 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265. The mere fact that the taxing authority denominates a tax as a "use" or "service" does not settle the question, however. The classification used by the taxing authority for the assessment of such fees must embody a uniform, fair, practical standard bearing a reasonable relationship to the use of state facilities. *Northwest Airlines, Inc., v. Joint City-County Airport Bd.* (1970, Mont. S.Ct.), 463 P.2d 470; *Hendrick v. Maryland* (1915), 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385.

The sole issue then on this appeal is whether the act of enplaning a commercial aircraft is reasonably related to the use of the facilities at Dress Memorial Airport for which the \$1.00 tax is levied.

The facts are undisputed and show the following:

In 1967, there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights at Dress Memorial Airport. In 1967, there were 14,834 take-offs and landings by commercial air carriers and there were 84,598 take-offs and landings by other civil and military aircraft.

The airport facilities at Dress Memorial Airport include the following facilities and services:

"(1) Main Terminal Building

air passenger service counters
air freight service counters and facilities
waiting room
rest rooms
dining room
bar
lunch counter
newsstand
barber shop
display areas
taxi stands
car rental counters
baggage facilities
telephone booths

"(2) Other Facilities

private hangar facilities
nonscheduled airline hangar facilities, office space, and waiting areas
entrance and exit facilities and sidewalks
parking lots
fuel storage areas
office space
runways and taxi-ways
approach lighting system
instrument lighting system"

By the express terms of the Ordinance the revenue from the tax is for the support of all of these facilities, the relevant part stating:

"Section 5. All revenue collected from said use and service charges shall be held by the

Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof." (Emphasis added.)

However, enplaning commercial air passengers are not the only persons using these facilities. It was stipulated by the parties that the above facilities and services are also used by the following classes of persons who are not subject to the \$1.00 tax imposed by Ordinance No. 33:

- (a) Enplaning commercial passengers who are active members of the armed forces;
- (b) Enplaning commercial passengers stopping over or changing planes at Dress Memorial Airport after arrival by commercial aircraft;
- (c) Deplaning commercial passengers;
- (d) Persons arriving or departing on non-commercial or nonscheduled aircraft;
- (e) Persons sending or receiving air freight shipments;
- (f) Persons meeting or seeing off commercial and non-commercial passengers;
- (g) Persons visiting the airport for the purpose of observing flight operations or for the purpose of using dining, bar, car rental, or other facilities.

These classes of users of airport facilities actually con-

stitute a majority of those persons who use one or more of the airport facilities.

It is obvious that certain enplaning commercial passengers are subject to the tax regardless of the extent to which they use the airport facilities. On the other hand persons who may make very extensive use of the facilities are not subject to the tax unless they actually board one of the appellees' commercial flights. For example, a commercial passenger carrying only a briefcase may be driven to the airport by his wife, immediately buy a ticket and board the airplane. He is subject to the so-called "use" tax. Another person may drive to the airport and park his car at the facility provided, get a haircut, eat dinner, use the washroom, and then get in his own private jet and take off. He does not pay the \$1.00 tax. Also a deplaning commercial passenger, who makes the same minimum use of the facilities as an enplaning commercial passenger, does not have to pay the tax.

The substantially identical issue was recently decided in *Northwest Airlines, Inc., v. Joint City-County Airport Bd.*, *supra*. That case involved a Montana statute which authorized airport boards to impose on each commercial air carrier operating aircraft over 12,500 lbs. a so-called "service" charge of \$1.00 for each originating passenger enplaning upon its aircraft at that airport.

The Montana Supreme Court held that the statute was unconstitutional in several respects including the fact that the tax could not be justified as a use and service fee because its imposition was not reasonably related to actual use of the airport facilities. The court said:

"In holding Chapter 281, and the tax imposed pursuant thereto, to be constitutional, the trial court rested its decision on the single proposition that the tax was user tax on passengers. A basic principle governing the power of the state to levy an exaction on interstate commerce, recently reaffirmed by the Supreme Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756, 87 S.Ct. 1389, 1391, 18 L.Ed.2d 505 (1967), is that 'State taxation falling on interstate commerce * * * can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' It follows from this that fees collected as compensation for the use of state facilities must be levied according to a 'uniform, fair, and practical standard.' *Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S.Ct. 140, 59 L.E. 385 (1915). The formula or classification adopted by the state must bear a reasonable relation to the use of state facilities, *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 60 S.Ct. 504, 84 L.Ed. 683 (1940), in order to insure that interstate commerce bear only the burden of fair compensation or intrastate activities incidental to it.

"Measuring against these constitutional standards, Chapter 281 cannot be justified as a use tax. The charge is levied arbitrarily without any reference to actual use of airport facilities by the passenger's use of terminal facilities. The stipulated facts indicate that the majority of users of the airport (arriving passengers, private aviators, visitors, etc.) are exempted from the payment of any charge, yet a substantial number of persons

so exempted make equal or greater use of airport facilities. Similarly, a passenger who has originated his journey elsewhere by commercial air carrier, and who makes a stopover at the Helena airport using airport facilities, is exempt from payment of the fees, while a traveler following an identical route and making no greater use of the facilities must pay if he arrives in Helena by means other than by commercial air carrier." 463 P.2d at 474.

The fact that the Montana tax was in form imposed on the carrier instead of the passengers as in the case at bar, is of no legal significance. *Henderson v. Mayor of New York* (1876), 92 U.S. 259, 23 L.Ed. 543.

It is clear and we so hold that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of Art. 1, ' 8, cl. 3 of the United States Constitution.

Judgment affirmed.

Hunter, C.J., Arterburn, Givan and Jackson, JJ.,
concur.

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Supreme Court, U.S.

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In The
SUPREME COURT OF THE UNITED STATES

March Term, 1971

No.

~~1488~~

70-99

EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, KENNETH C. KENT,
ELMO HOLDER, ROBERT M. LEICH, IAN F.
LOCKHART, CLIFFORD K. ARDEN, JAMES A.
GEYER and PAUL E. HATFIELD, on behalf of
himself and all other persons similarly situated,

Petitioners,

vs.

DELTA AIRLINES, INC., EASTERN AIRLINES,
ALLEGHENY AIRLINES, INC., and WILLIAM
F. WOOD, on behalf of himself and all other
persons similarly situated,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA**

HOWARD P. TROCKMAN
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20 N. W. Sixth Street
Evansville, Indiana 47708
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In The
SUPREME COURT OF THE UNITED STATES

March Term, 1971

No. _____

**EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, KENNETH C. KENT,
ELMO HOLDER, ROBERT M. LEICH, IAN F.
LOCKHART, CLIFFORD K. ARDEN, JAMES A.
GEYER and PAUL E. HATFIELD, on behalf of
himself and all other persons similarly situated,**

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**DELTA AIRLINES, INC., EASTERN AIRLINES,
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F. WOOD, on behalf of himself and all other
persons similarly situated,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA**

*To the Honorable, the Chief Justice of the United
States and the Associate Justices of the Supreme
Court of the United States:*

Petitioners pray that a Writ of Certiorari issue to
review the judgment of the Supreme Court of the State
of Indiana entered on December 23, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Indiana, Cause No. 869 S 179, is printed in Appendix A hereto and is reported in 265 N.E. 2d 27.

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana, printed in Appendix A hereto, was entered on December 23, 1970. Said Judgment, was final and no petition or order respecting a rehearing was requested or required (*Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L.Ed. 283 (1923)), and no request or order for an extension of time within which to petition for Certiorari was filed, granted, or required.

The jurisdiction of this Court is invoked under 28 USCA 1257(3).

THE QUESTIONS PRESENTED

1. Where an Airport, at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as intrastate, is it authorized to collect a reasonable use and service charge from commerce for the privilege of using and enjoying such facilities and for the purpose of defraying the costs and maintenance thereof?

2. Is a use and service charge of One Dollar (\$1.00) imposed upon each enplaning commercial airline passenger by an Airport which, at great expense to its taxpayers, provides its facilities for the primary use and benefit of commercial airline passengers, an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The constitutional provision involved is the Commerce Clause, the same being Article I, Section 8, Clause 3 of the United States Constitution.

The Indiana legislative authorization for enactment of this use and service charge is found in the Acts of 1959, Chapter 15, page 32, the same being Burns' Indiana Statutes, Annotated, Section 14-1215.

The Ordinance involved in this proceeding was passed by the Petitioner, Evansville-Vanderburgh Airport Authority District, as Ordinance No. 33, on February 26, 1968.

The provisions of said Constitution, Statute and Ordinance are printed in Appendix B hereto.

STATEMENT

This was an action brought by Respondents against Petitioners for a Restraining Order; Temporary Injunction and Permanent Injunction against the enforcement of Ordinance No. 33 of the Petitioner, Evansville-Vanderburgh Airport Authority District, enacted on February 26, 1968, which Ordinance established and, effective July 1, 1968, sought to impose a use and service charge of One Dollar (\$1.00) for each passenger enplaning commercial aircraft at Dress Memorial Airport, Evansville, Indiana, operated by the Petitioner Airport Authority. Respondents' Complaint was filed in four (4) pleading paragraphs, the first paragraph of which alleged that Petitioner's Ordinance No. 33 constituted an unreasonable burden on interstate commerce and was, therefore, in violation of Article I, Section 8 of the United States Constitution. (R. 16:)

Upon the filing of Respondents' Complaint on June 28, 1968, the Superior Court of Vanderburgh County, on the same date, issued a Restraining Order without Notice. (R. 76) On February 21, 1969, said Superior Court, after extensive briefing and argument of counsel, issued a Temporary Injunction (R. 312), incorporating therein special Findings of Fact and Conclusions of Law wherein the Court held that Ordinance No. 33 violated Article I, Section 8 of the United States Constitution. (R. 314-333) Petitioners filed a Motion for Change of Venue from the Judge on February 27, 1969, (R. 336), which motion was subsequently denied. (R. 350) On March 24, 1969, Petitioners filed their Answers to Respondents' Complaint wherein Petitioners denied that its Ordinance No. 33 constituted an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution, (R. 357-373), and on the same date Petitioners filed their Counterclaim praying for a recovery under its use and service charge Ordinance against the Respondent Airlines in accordance with the number of enplaning passengers which were expected to be enplaned during 1969, together with attorneys' fees and litigation costs. (R. 353-356) On April 2, 1969, Respondents filed their Demurrer to Petitioners' Counterclaim (R. 374-378), which Demurrer was sustained on April 16, 1969. On April 17, 1969, Respondents filed their Motion for Summary Judgment (R. 383-385) and on May 1, 1969, Petitioners filed their Motion for Summary Judgment. (R. 388-389) Finally, on May 8, 1969, the Superior Court of Vanderburgh County sustained Respondents' Motion for Summary Judgment and overruled Petitioners' Motion for Summary Judgment and issued its permanent injunction enjoining the enforcement of the Petitioners' use and service charge.

Ordinance No. 83. (R. 391-395) On July 11, 1969, said lower Court entered its Nunc Pro Tunc Judgment wherein the Court declared said Ordinance to be unlawful and unconstitutional under Article I, Section 8, Clause 3 of the United States Constitution. (R. 403-408) On August 5, 1969, Petitioners timely filed their Transcript and Assignment of Errors wherein Petitioners, among other things, assumed as error and preserved for appeal the validity of said Ordinance under Article I, Section 8, Clause 3 of the United States Constitution. (R. 1-8)

The decision of the Superior Court of Vanderburgh County was subsequently affirmed by the Supreme Court of the State of Indiana on December 23, 1970. (Appendix A.)

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Indiana has passed upon a Federal question of substance which has not been settled by this Court and there is a conflict of authorities on this question among the various states. The specific question raised by this Petition for Writ of Certiorari concerns the constitutionality of an ordinance enacted by the Petitioner Airport Authority which sought to impose a use and service charge of One Dollar (\$1.00) for each enplaning passenger of commercial aircraft at Petitioners' Airport for the privilege of using and enjoying the facilities which are being provided for said passengers and which use and service fee is designed, in part, to defray the costs of providing such facilities by the Petitioners. The question before the Court on this Petition for Writ of Certiorari relates to the ability of a state or municipal body to require interstate, as well as intrastate, commerce to pay its own way.

As stated, the Supreme Court of Indiana decided this case adversely to the Petitioners on December 23, 1970. Immediately prior to said decision, the Supreme Court of Montana, in the case of *Northwest Airlines, Inc. v. Joint City-County Airport Board*, 154 Mont. 352, 463 P.2d 470 (1970), declared unconstitutional a state legislative enactment establishing a service charge of One Dollar (\$1.00) for each passenger enplaning air carriers at all publicly operated airports within the State. In the *Northwest* case, the Court declared that there was no issue before the Court as to the need for revenues to maintain and operate the Helena Airport nor as to the propriety of raising revenues by assessing proper charges on the commercial air carriers using the Airport since the record did not support such a need.

Subsequently, on January 29, 1971, the Supreme Court of New Hampshire, in the case of *Northeast Airlines, Inc., et al v. New Hampshire Aeronautics Commission, et al*, adopted a contrary view and held that a similar One Dollar (\$1.00) enplaning fee did not constitute an unreasonable burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution and further held that it did not regard the decisions of the Montana Supreme Court and the Indiana Supreme Court in the instant case, as controlling, and, accordingly, did not adopt the views which these cases expressed. The New Hampshire Supreme Court declared that the critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all, citing *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 85 S. Ct. 1156, 14 L.Ed. 2d 68, 85 (1965).

Further, the Supreme Court of New Hampshire stated that even a reasonable charge to federal instru-

mentalities making "substantial" use of public airport facilities is sanctioned by Federal Statute, citing 49 *USCA Section 1110(4)*. Accordingly, the Court concluded that the enplanement fee was what it purported to be, a fee for the use of facilities furnished by the public and that its incidence depends upon an event which is wholly intrastate, namely the enplanement of passengers within the State of New Hampshire at a facility publicly provided or supported; that the burden upon the carriers was minimal, and did not exceed reasonable compensation for the use provided. The opinion of the Supreme Court of the State of New Hampshire, *Merrimack, No. 6086*, is printed in Appendix C and is not yet reported in the official reports.

While the Respondents will, undoubtedly, oppose the granting of this Petition for Certiorari, it is virtually certain that the unsuccessful airlines in the New Hampshire proceeding, ultimately, will petition this Court for a review of its adverse decision.

Thus, the question of the validity of the Petitioner Airport Authority's Ordinance, here involved, under the Commerce Clause of the Federal Constitution is of far-reaching importance to all state and municipal taxing bodies where facilities are provided for interstate, as well as intrastate, commerce at a great financial burden to its taxpayers.

The Acts of 1959, Chapter 15, page 32, of the Indiana General Assembly, the same being *Burns' Indiana Statutes, Annotated, Section 14-1215*, specifically authorizes the Petitioner Airport Authority, at subparagraph 9:

"to adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the District."

and at subparagraph 16 thereof to:

"... make all reasonable rules and regulations ... for the management and control of its airports and landing fields and other navigation facilities and other property under its control."

"... to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of any such airports or landing fields, and other air navigation facilities . . . and to fix, charge and collect fees for public admissions and privileges."

The State of Indiana has long since held that the Legislature may confer and delegate the power to adopt rules, by-laws and ordinances and has the right to delegate to the Executive or Administrative its power to fix rates. *Financial Air Corporation v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939); *Sou. Ry. Co. v. Hunt*, 42 Ind. App. 1, 83 N.E. 721 (1908).

The record in this proceeding amply displays both the legislative authorization for the enactment of a user charge and the financial need of the Petitioner Airport Authority to raise the revenues created through the enactment of such charge for the purpose of defraying the cost of present and future requirements for capital improvements at the Petitioners' Airport.

The Respondents below stipulated and agreed as to the truth of certain facts submitted by the Petitioners below, each of which Stipulated Facts of the Petitioners are material and relevant to this Petition and support the constitutionality of the use and service charge established by Petitioners' Ordinance No. 33. (R. 469-490) These Stipulated Facts show, among other things, that:

- (a) The use and service charge, Ordinance No. 33, was adopted by the Petitioners, Evansville-Vanderburgh Airport Authority District, in accordance with the legal procedures required by Indiana Law. (R. 489)
- (b) In the year 1967, approximately 146,955 enplaning passengers boarded aircraft at Dress Memorial Airport. That the number of enplaning and deplaning passengers at Dress Memorial Airport are approximately the same (R. 478), and that Petitioners' Ordinance No. 33 imposes a use and service charge of One Dollar (\$1.00) on all enplaning passengers of commercial airlines whether said enplaning passengers travel in intrastate or interstate commerce. (R. 480)
- (c) That the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville. (R. 487)
- (d) Approximately forty percent (40%) of the users of Dress Memorial Airport are non-residents of Vanderburgh County, Indiana, wherein Dress Memorial Airport is located, and that the use and service charge established by Ordinance No. 33 is designed to be collected from all commercial airline enplaning passengers using Dress Memorial Airport without regard to their residence or ownership of property within Vanderburgh County, Indiana. (R. 486)
- (e) That the Terminal Building and most of its facilities are primarily designed for use by per-

sons travelling on commercial airlines and would not be essential for the operation of a non-commercial airport. (R. 480)

- (f) That the real estate, runway lengths, approach areas, taxiways, ramp areas and approach lighting system of Dress Memorial Airport would not be so extensive except for the accommodation of commercial airline carriers and their passengers. (R. 480, 481)
- (g) That the capital improvement program recommended by the consultants of the Petitioners is primarily designed for the safety, comfort and convenience of commercial airlines, its equipment, personnel and commercial airline passengers (R. 486) and based upon the present bonded indebtedness of the Petitioner Airport Authority and the need for additional capital improvements, as shown by the exhibits attached to the stipulations, there exists a need for additional revenue which the use and service charge, Ordinance No. 33, was designed to raise. (R. 486)
- (h) That the adoption, initiation and fulfillment of the capital improvement program recommended by the consultants of the Petitioner Airport Authority and the retirement of the indebtedness created thereby will require more revenues than would be produced by the use and service charge, Ordinance No. 33, assuming that said improvements would be amortized over a fifteen (15) year period and that the forecast of probable passenger movement at the Petitioners' Airport is reasonably accurate. (R. 448)
- (i) That, presently, the funds which are needed,

over and above operating revenues, to retire existing and future capital improvement costs at Dress Memorial Airport are derived from tax levies on all assessed property located only within Vanderburgh County, Indiana, (R. 486) and that the fulfillment of the capital improvements program recommended by the consultants of the Petitioners will require more revenue than can be produced by the maximum tax levy now permitted by law to be levied by the Petitioners and will necessarily require additional revenues in excess of those which would be produced by Ordinance No. 33 in order to amortize the costs thereof. (R. 489)

The right of a state or municipality to charge for the use of valuable facilities furnished to commerce has been upheld by the Supreme Court of the United States. In the much cited case of *Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886), the Supreme Court of the United States was called upon to examine the constitutionality of an Illinois legislative enactment vesting a Board of Canal Commissioners with authority to prescribe rates or tolls for passage of all vessels through its locks. The Court, in sustaining the constitutionality of the enactment, held at page 548 of the opinion, that the exaction of tolls is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream and that private inconvenience must yield to the public good.

Additionally, the right of the states to impose upon motor vehicles using highways in interstate commerce such charges as will reasonably defray the expenses and represent a fair contribution to the cost of constructing and maintaining those highways has been well established. *Aero Mayflower Transit Co. v. R.R.*

Commissioners, 332 U.S. 495, 503, 68 S.Ct. 167, 92 L.Ed. 99 (1947).

The amount of charges and the method of collection are primarily for determination by the state itself, and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, such charges constitute no burden upon interstate commerce. *Hendrick v. Maryland*, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385 (1914); *Richmond Baking Company v. Department of Treasury*, 215 Ind. 110, 18 NE.2d 778 (1938); *Kersey v. City of Terre Haute*, 161 Ind. 471, 473, 68 N.E. 1027 (1903).

As in the case of *Hendrick v. Maryland*, *supra*, where the Supreme Court of the United States declared that the highways are public property and it is within the power of the state to require the users thereof to contribute to their cost and maintenance, and to require those who make special use thereof to contribute to their upkeep, the runways, Terminal Building and related facilities of the Petitioner Airport Authority are literally the highways of commercial aircraft requiring contribution toward their upkeep and maintenance.

The question presented by this Petition for a Writ of Certiorari is one of grave and vital importance to the preservation of the right of states to provide for the adequate safety and accommodation of interstate as well as intrastate commerce. This is particularly true where the Federal government has not either assumed the exclusive cost and maintenance of such facilities or precluded the states, or its municipally delegated bodies from charging equitably for the use of such facilities.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

HOWARD P. TROCKMAN
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Attorneys for Petitioners

APPENDIX A

In The SUPREME COURT OF INDIANA

EVANSVILLE-VANDERBURGH)	
AIRPORT AUTHORITY DIS-)	
TRICT, KENNETH C. KENT,)	
ELMO HOLDER, ROBERT M.)	
LEICH, IAN F. LOCKHART,)	
CLIFFORD K. ARDEN, JAMES)	
A. GEYER and PAUL E.)	
HATFIELD, On Behalf of Himself)	
and All Other Persons Similarly)	
Situated,)	
)	
<i>v.</i>)	
<i>Appellants,</i>)	No. 869 S 179
)	
DELTA AIRLINES, INC.,)	
EASTERN AIRLINES,)	
ALLEGHENY AIRLINES, INC.,)	
and WILLIAM F. WOOD, On)	
Behalf of Himself and All Other)	
Persons Similarly Situated,)	
)	
)	
<i>Appellees.</i>)	

APPEAL FROM THE SUPERIOR COURT OF
VANDERBURGH COUNTY
Honorable Benjamin E. Buente, Judge

DeBRULER, J.

This is an appeal from a final judgment in the Vanderburgh County Superior Court granting appellees a permanent injunction against the enforcement of Evansville-Vanderburgh Airport Authority District's Ordinance No. 33, which ordinance establishes a charge of \$1.00 for each passenger (with certain exceptions) enplaning a commercial aircraft at Dress Memorial Airport, Evansville, Indiana. The other appellants are either directors or officers of the appellant Airport Authority District.

On February 26, 1968, appellants enacted Ordinance No. 33, intended to become effective July 1, 1968, which levied a charge of \$1.00 on enplaning commercial air passengers at Dress Memorial Airport. The ordinance, in pertinent part, reads:

"Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

* * *

"Section 4. The term 'each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport' shall not include, nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

"Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof."

The appellee airlines are commercial air carriers transporting passengers, freight, express and mail to and from Dress Memorial Airport in interstate commerce under authorization of the Civil Aeronautics Board. Each of the appellee airlines leases and operates facilities at Dress Memorial Airport for the purposes of providing commercial air passenger and freight service. The appellees sought to enjoin the enforcement of Ordinance No. 33 on the grounds it was unconstitutional and illegal in several respects. In granting appellees a permanent injunction the trial court made eleven conclusions of law, but in the view we take of this case it is necessary to discuss only the following one:

"The \$1.00 charge imposed by ordinance No. 33 upon passengers enplaning upon commercial aircraft at Dress Memorial Airport, not being related to or apportioned according to the use of facilities at Dress Memorial Airport, constitutes an unreasonable burden upon interstate commerce in the United States."

Appellants' arguments on appeal is that that conclusion is erroneous and the \$1.00 tax is a valid service tax for the use of facilities provided by appellants at Dress Memorial Airport and thus not an unreasonable burden on interstate commerce.

There is no question that the incidence of the tax imposed by Ordinance No. 33 falls on interstate commerce. The tax is on the act of enplanement on one of the appellee airlines and in 1966, 88.4% of the persons departing Dress Memorial Airport upon the appellee airlines enplaned for ultimate destinations beyond the State of Indiana.

The basic principle governing the power of a state to levy a tax affecting interstate commerce is that such a tax "can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bel-las Hess, Inc. v. Dept. of Revenue* (1967), 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505; *Freeman v. Hewit* (1946), 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265. The mere fact that the taxing authority denominates a tax as a "use" or "service" does not settle the question, however. The classification used by the taxing authority for the assessment of such fees must embody a uniform, fair, practical standard bearing a reasonable relationship to the use of state facilities. *Northwest Airlines, Inc. v. Joint City-County Airport Bd.* (1970, Mont. S.Ct.), 463 P.2d 470; *Hendrick v. Maryland* (1915), 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385.

The sole issue then on this appeal is whether the act of enplaning a commercial aircraft is reasonably related to the use of the facilities at Dress Memorial Airport for which the \$1.00 tax is levied.

The facts are undisputed and show the following:

In 1967, there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights at Dress Memorial Airport. In 1967, there were 14,834 take-offs and landings by commercial air carriers and

there were 84,598 take-offs and landings by other civil and military aircraft.

The airport facilities at Dress Memorial Airport include the following facilities and services:

"(1) Main Terminal Building

air passenger service counters
 air freight service counters and facilities
 waiting room
 rest rooms
 dining room
 bar
 lunch counter
 newsstand
 barber shop
 display areas
 taxi stands
 car rental counters
 baggage facilities
 telephone booths

"(2) Other Facilities

private hangar facilities
 nonscheduled airline hangar facilities, office,
 space, and waiting areas
 entrance and exit facilities and sidewalks
 parking lots
 fuel storage areas
 office space
 runways and taxi-ways
 approach lighting system
 instrument lighting system"

By the express terms of the Ordinance the revenue from the tax is for the support of all of these facilities, the relevant part stating:

"Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the *construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.*" (Emphasis added.)

However, enplaning commercial air passengers are *not* the only persons using these facilities. It was stipulated by the parties that the above facilities and services are also used by the following classes of persons who are *not* subject to the \$1.00 tax imposed by Ordinance No. 33:

- (a) Enplaning commercial passengers who are active members of the armed forces;
- (b) Enplaning commercial passengers stopping over or changing planes at Dress Memorial Airport after arrival by commercial aircraft;
- (c) Deplaning commercial passengers;
- (d) Persons arriving or departing on noncommercial or nonscheduled aircraft;
- (e) Persons sending or receiving air freight shipments;
- (f) Persons meeting or seeing off commercial and noncommercial passengers;
- (g) Persons visiting the airport for the purpose of observing flight operations or for the purpose of using dining, bar, car rental, or other facilities.

These classes of uses of airport facilities actually constitute a majority of those persons who use one or more of the airport facilities.

It is obvious that certain enplaning commercial passengers are subject to the tax regardless of the extent to which they use the airport facilities. On the other hand persons who may make very extensive use of the facilities are not subject to the tax unless they actually board one of appellees' commercial flights. For example, a commercial passenger carrying only a briefcase may be driven to the airport by his wife, immediately buy a ticket and board the airplane. He is subject to the so-called "use" tax. Another person may drive to the airport and park his car at the facility provided, get a haircut, eat dinner, use the washroom, and then get in his own private jet and take off. He does not pay the \$1.00 tax. Also a deplaning commercial passenger, who makes the same minimum use of the facilities as an enplaning commercial passenger, does not have to pay the tax.

The substantially identical issue was recently decided in *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, *supra*. That case involved a Montana statute which authorized airport boards to impose on each commercial air carrier operating aircraft over 12,500 lbs. a so-called "service" charge of \$1.00 for each originating passenger enplaning upon its aircraft at that airport.

The Montana Supreme Court held that the statute was unconstitutional in several respects including the fact that the tax could not be justified as a use and service fee because its imposition was not reasonably related to actual use of the airport facilities. The court said:

"In holding Chapter 281, and the tax imposed pursuant thereto, to be constitutional, the trial court rested its decision on the single proposition that the tax was user tax on passengers. A basic principle governing the power of the state to levy an exaction on interstate commerce, recently reaffirmed by the Supreme Court in *National Bel-las Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756, 87 S.Ct. 1389, 1391, 18L.Ed.2d 505 (1967), is that 'State taxation falling on inter-state commerce * * * can only be justified as de-signed to make such commerce bear a fair share of the cost of the local government whose protec-tion it enjoys.' It follows from this that fees col-lected as compensation for the use of state faci-lities must be levied according to a 'uniform, fair, and practical standard.' *Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S.Ct. 140, 59 L.Ed. 385 (1915). The formula or classification adopted by the state must bear a reasonable relation to the use of state facilities, *McCarroll v. Dixie Grey-hound Lines, Inc.*, 309 U.S. 176, 60 S.Ct. 504, 84 L.Ed. 683 (1940), in order to insure that inter-state commerce bear only the burden of fair com-pensation or intrastate activities incidental to it.

"Measuring against these constitutional stand-ards, Chapter 281 cannot be justified as a use tax. The charge is levied arbitrarily without any ref-erence to actual use of airport facilities by the passenger's use of terminal facilities. The stipu-lated facts indicate that the majority of users of the airport (arriving passengers, private avia-tors, visitors, etc.) are exempted from the pay-ment of any charge, yet a substantial number of persons so exempted make equal or greater use

of airport facilities. Similarly, a passenger who has originated his journey elsewhere by commercial air carrier, and who makes a stopover at the Helena airport using airport facilities, is exempt from payment of the fee, while a traveler following an identical route and making no greater use of the facilities must pay if he arrives in Helena by means other than by commercial air carrier." 463 P.2d at 474.

The fact that the Montana tax was in form imposed on the carrier instead of the passengers as in the case at bar, is of no legal significance. *Henderson v. Mayor of New York* (1876), 92 U.S. 259, 23 L.Ed. 543.

It is clear and we so hold that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of Art. 1, § 8, cl. 3 of the United States Constitution.

Judgment affirmed.

Hunter, C.J., Arterburn, Givan and Jackson, JJ., concur.

APPENDIX B

I. UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 8, CLAUSE 3:

Section 8. POWERS OF CONGRESS.

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

II. INDIANA STATUTES INVOLVED

Airport Authority District Statute (Evansville), Acts of 1959 of the Indiana General Assembly, Chapter 15, page 32, the same being Burns Indiana Statutes, Annotated, Section 14-1215, which provides as follows:

14-1215. POWERS OF THE BOARD. — In addition to the powers and duties conferred upon it elsewhere in this act (Sections 14-1201 — 14-1235), such board shall have full power and authority to do all acts necessary or reasonably incident to carrying out the purpose of this act including, but not in limitation thereof, the following:

1. As a municipal corporation, in its name to sue and be sued in any court of competent jurisdiction.

9. To adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the district.

16. General Powers.

... To manage and operate any and all airports and landing fields and other air navigation fa-

cilities now or hereafter acquired or maintained by any such district; and to lease all or any part of any such airport or landing field and any buildings and other structures thereon and parts hereof and to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of any such airports or landing fields, and other air navigation facilities, and for aircraft landing thereon, and the servicing thereof; and to erect and construct such public recreational facilities as will not conflict or interfere with air operational facilities; and to fix, charge and collect fees for public admissions and privileges; . . .

HI. ORDINANCE NO. 33 PASSED BY THE EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT ON FEBRUARY 26, 1968
EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT
ORDINANCE NO. 33

AN ORDINANCE ESTABLISHING AND FIXING A USE AND SERVICE CHARGE FOR ALL ENPLANING PASSENGERS UTILIZING AIRPORT PREMISES AND FACILITIES.

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the

use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by num-

erous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants,

employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

- (a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;
- (b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittance shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar (\$1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Van-

derburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:

/s/ Robert M. Leich
Robert M. Leich, Secretary

APPENDIX C

OPINION OF NEW HAMPSHIRE SUPREME
COURT

Merrimack,
No. 6086.

NORTHEAST AIRLINES, INC. & a.

v.

NEW HAMPSHIRE AERONAUTICS
COMMISSION & a.

January 29, 1971

Devine, Millimet, McDonough, Stahl & Branch and
Robert A. Backus (Mr. Joseph A. Millimet orally) for
the plaintiffs.

Warren B. Rudman, Attorney General and *W. Michael Dunn*, Assistant Attorney General (Mr. Dunn orally), for the defendants.

DUNCAN, J. By petition for declaratory judgment, the plaintiff airlines question the constitutionality of RSA 422:43 (supp.), imposing upon them, as common carriers of passengers for hire by aircraft on regular schedules, a service fee of one dollar for each passenger emplaning upon their aircraft at publicly operated landing areas in this State. For the three-year period presently involved, the fees charged to the plaintiff Northeast Airlines, Inc. have averaged somewhat over \$41,000 a year, and to the plaintiff Mohawk Airlines a little over \$2600. The facts were stipulated by the parties, and the Superior Court. (*Loughlin, J.*) reserved and transferred without ruling all questions of law presented.

When first before this court as a proposal in the form of House Bill 435 at the 1959 session of the legis-

lature, the service fee was considered by reason of statutory definition (RSA 422:3(II)) to be applicable only to carriers engaged solely in intrastate commerce, and was considered not to violate the Constitution of this State, so long as it was reasonable recompense for facilities furnished. *Opinion of the Justices*, 102 N.H. 73, 150 A. 2d 522 (1959). It was intimated that objection because of its effect upon interstate commerce was not likely in view of *Aero Transit Co. v. Comm'rs*, 332 U.S. 495, 92 L.Ed. 99, 68 S.Ct. 167 (1947) and *Tirrell v. Johnston*, 86 N.H. 530, 171 A. 641 (1934). *Id.* at 75, 150 A. 2d at 524.

As enacted in 1959, the statute was made applicable to common carriers of passengers "whether in interstate or intrastate operations" (RSA 422:43); and the phrase "passenger carrier by aircraft" was substituted for the phrase "air carrier" used by the bill. Thus House Bill 435 as enacted was made applicable to interstate as well as intrastate commerce.

Th plaintiffs suggest that because of these and later changes, it cannot be said that section 43 (supp.) has "ever been reviewed by this court." While this may be so, the fact remains that the essential characteristics of the charge or fee were considered in *Opinion of the Justices*, *supra*, and it was upheld. See also *Opinion of the Justices*, 94 N.H. 513, 52 A. 2d 859 (1947). We continue to regard the charge as being what it purports to be: a "service fee on (common) carriers" of passengers for hire on a regular schedule; while s. 44 of the act imposes a like charge upon carriers under contract or by charter. RSA 422:44.

We also regard the charge as one levied upon the carrier and not the passenger, although we recognize that the statute expressly provides that it shall not

prevent the carrier from collecting the fee over, from its passengers. In this connection we note also that by reason of a 1969 amendment the amount of the fee now depends not only upon the number of passengers carried, but also upon the gross weight of the aircraft. RSA 422:43 (supp.). Thus for planes having a gross weight of less than 12,500 pounds, which are crafts described by federal statute as "small aircraft" (26 U.S.C.A. s 4263 (d) (1967)), the fee is one-half of that assessed per passenger against the plaintiffs, which operate heavier aircraft. Since we accept the view that the charge is levied upon the carrier, we do not reach the argument advanced by the plaintiffs that the statute invades the constitutional rights of passengers to travel interstate. See *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).

Our conclusion that the fee is levied upon the carrier is fortified not only by the express language of the statute, but also by the provision originating with House Bill 435 *supra*, that the proceeds of the tax shall be covered into the aeronautical fund established by section 42, for the purpose of establishing and maintaining air navigation facilities, and liquidating obligations incurred under the aeronautics act. RSA 422:42.

The cases from other jurisdictions upon which the plaintiffs rely in support of their arguments do not persuade us that our statute must be held invalid. In *Allegheny Airlines, Inc. v. Sills*, 110 N.J. Super. 54, 264 A. 2d 268 (1970), a statute under attack would have imposed a service charge for the benefit of municipalities which did not contribute to the management or cost of operation of the airport in question. Hence the court concluded that the charge could not be jus-

tified as a service charge, and was invalid as a tax upon interstate commerce. In holding the charge invalid, the court relied upon *Northwest Airlines, Inc. v. Joint City-County Air. Bd.*, 154 Mont. 352, 463 P.2d 470 (Mont. 1970). That case involved a statute more closely resembling our own. It was considered by the Montana court to be in essence a tax upon the passengers, and in holding it invalid the court placed substantial reliance upon *Passenger Cases*, 48 U.S. (7 How.) 283, 12 L. Ed. 702 (1849), and upon *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1867), which invalidated a tax expressly imposed upon passengers. Those decisions in turn relied upon *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316, 4 L. Ed. 579 (1819) and its unsound declaration . . . that the power to tax is a power to destroy" (*Tirrell v. Johnston*, 86 N.H. 530, 547, 171 A. 641, 651 (1934) a declaration to which Mr. Justice Holmes later rejoined, in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223, 72 L. Ed. 857, 859, 48 S. Ct. 451, 453 (1928): "not . . . while this Court sits."

Even in cases involving taxes upon interstate commerce, which this case is not, the law has so far advanced since *McCulloch v. Maryland supra*, that a recent comment could say that "Both judicial and legislative developments stemming from the Supreme Court's decision in *Northwestern [Northwestern States Portland Cement Co. v. Minnesota]*, 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959) suggest that the critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all" (citing *General Motors Corp. v. District*, 380 U.S. 553, 14 L. Ed. 2d 68, 85 S. Ct. 1156 (1965) and *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 19 L. Ed.

2d 1201, 88 S. Ct. 995 (1968)). Note, 36 U. of Chi. L. Rev. 186, 204-05.

Most recently the *Northwest Airlines* case *supra* was followed and heavily relied upon in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 265 N.E. 2d 27 (Ind. 1970), invalidating a district ordinance which imposed a use and service charge for the purpose of defraying the costs of the district's airport, upon the ground that the "tax imposed" was not "reasonably related to the use of facilities" and was therefore a burden upon interstate commerce. Since we do not regard the authorities relied upon by this and the *Northwest Airlines* case as controlling, we do not adopt the views which they express.

Many of the plaintiffs' objections to the carrier service fee are answered by the comprehensive opinion of Peaslee, C. J. in *Tirrell v. Johnston supra*, upholding the validity of the gasoline road toll under state and Federal Constitutions. As was there observed, "The state may tax things used in interstate commerce as it taxes other like things. This is not taxing interstate commerce." *Id.* at 551, 171 A at 653. However, we do not consider the charge to be an act of the State "in its sovereign capacity as a layer of taxes for the support of government or a regulator of conduct." *Tirrell v. Johnston, supra* at 540, 171 A. at 647. We regard it rather as a "charge for the use of facilities furnished." *Id.* at 541, 171 A. at 647.

The complaint that the charge is discriminatory because imposed upon an arbitrary class of users including the plaintiffs is not convincing. Other classes of users, whose use of the facilities is only irregular, or for purposes incidental to business other than the business of carriage of passengers by air for hire may

reasonably be differently classified, as may the carriers of passengers by lighter craft, having smaller carrying capacities. See *Morf v. Bingaman*, 298 U.S. 407, 80 L. Ed. 1245, 56 S.Ct. 756 (1936). Even a reasonable charge to federal instrumentalities making "substantial" use of public airport facilities is sanctioned by federal statute. 49 U.S.C.A. § 1110 (4)

We conclude that the charge in question is what it purports to be, a fee for the use of facilities furnished by the public. Its incidence depends upon an event which is wholly intrastate, namely the emplanement of passengers within this jurisdiction at a facility publicly provided and supported; the burden upon the carrier is minimal, and is not claimed to exceed reasonable compensation for the use provided. *Aero-Transit Co. v. Comm'rs*, 332 U.S. 495 *supra*; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950); *Bode v. Barrett*, 344 U.S. 583, 97 L. Ed. 567, 73 S. Ct. 468 (1953); Annot., 97 L. Ed. 573 (1953); Annot., 17 A.L.R. 2d 421 (1951).

The fees imposed are valid and collectible, and a declaratory judgment in favor of the defendant Director should be entered accordingly.

Judgment for the defendants.

All concurred.

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Supreme Court, U. S.
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APR 14 1970

E. ROBERT BEVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1499

70-99

EVANSVILLE-VANDESBURG AIRPORT AUTHORITY
DISTRICT, et al., Petitioners,

v.

DELTA AIRLINES, INC., et al., Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANT-
ING OF THE PETITION FOR A WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 1488

EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY
DISTRICT, *et al.*, *Petitioners*,

v.

DELTA AIRLINES, INC., *et al.*, *Respondents*.

**RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANT-
ING OF THE PETITION FOR A WRIT OF CERTIORARI**

THE QUESTION PRESENTED

For reasons stated in the Argument, *infra* at 3, the two questions posed by Petitioner are more properly stated as one:

Whether the Airport Board's exaction of \$1.00 for the act of enplanement by each commercial airline passenger violates the Commerce Clause of the United

States Constitution where the exaction is imposed directly on the passengers, 88% of whom are departing the airport into interstate commerce, without regard to any actual use they make of airport facilities, and where such passengers constitute a minority of all persons using such facilities.

SUPPLEMENTAL STATEMENT OF THE CASE

Although Petitioners' statement of the case is correct as far as it goes, it omits facts required to give an accurate picture of the procedural posture of this case. Respondents' two complaints each challenged in separate counts the validity of Ordinance No. 33 on three separate constitutional grounds:

- (1) Ordinance No. 33 imposes a burden on interstate commerce in violation of the Commerce Clause. R. 16-17, 269.
- (2) Ordinance No. 33 interferes with the right of passengers to travel among the several states. R. 22, 273.
- (3) The burden of Ordinance No. 33 falls on an irrationally drawn class of persons, in violation of the Equal Protection Clauses of the Fourteenth Amendment and the Indiana constitution. R. 28, 277.

These grounds were kept separate in the briefs of both parties in the trial court, and the trial court entered separate conclusions of law holding Ordinance No. 33 invalid on each ground. R. 330-31, 404-05. But Petitioners completely ignored the right-to-travel issue in their briefs to the Indiana Supreme Court and

treated only the Commerce Clause and equal protection issues. Respondents' brief in that court pointed out (at 13-16, 31-37) that, under Indiana procedural rules, Petitioners had thereby abandoned the right-to-travel issue and that this abandonment required affirmance on that independent ground for the decision of the trial court. However, the Indiana Supreme Court's opinion neither addressed itself to the question whether the right-to-travel issue was properly before it, nor did it express any view on the merits of that issue. It also ignored the equal-protection issue, basing its decision entirely on Commerce Clause grounds.

ARGUMENT

I. The Decision Below Is in Accord With the Applicable Decisions of This Court

Both of The Questions Presented as stated in the Petition (Pet. 2) invite this Court to consider whether the Airport Board is permitted by the Commerce Clause to impose user charges or services fees on persons using facilities furnished by the Authority. Of course it may, and neither the courts below nor the Respondents have contended that the Airport Board may not impose *proper* user charges. The issue in this case is whether the particular provisions of Ordinance No. 33 establish a valid user charge or whether, as the court below unanimously held, those provisions fail to conform to all of the Commerce Clause standards for a valid user charge as enunciated in the decisions of this Court.

Petitioners concede (Pet. 12) that one such standard is whether Ordinance No. 33 embodies a "uniform, fair, and practical standard" bearing a reasonable relationship to the use of facilities owned by the Airport

Board. *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915). *Accord*, *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940); *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931); *Sprout v. City of South Bend*, 277 U.S. 163 (1928). The opinion below lists in detail the facilities furnished by the Airport Board (Pet. App. A 18) and the classes of persons making use of them (Pet. App. A 19), and those facts need not be repeated here. It is sufficient that on those facts there is no relationship between the extent to which a person subject to the boarding tax imposed by Ordinance No. 33 uses those facilities and the fact of his enplaning a commercial aircraft. Pet. App. A 20-22. Indeed, a majority of the persons using the facilities are subject to no tax even though their actual use of the facilities is "no different" from the use by enplaning passengers (Finding No. 39, R. 327-28) and may often be more extensive. Pet. App. A 20.

Although it did not do so, the court below might also have rested its decision on other Commerce Clause cases which establish additional standards of validity not met by Ordinance No. 33. There is an absolute ban on state taxes the operating incidence of which is on an integral aspect of interstate commerce.

"It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954) (Commerce Clause decision involving the movement of natural gas). *Accord*, *Memphis Nat-*

ural Gas Co. v. Stone, 335 U.S. 80 (1948). The situation is the same with respect to the instant case since "the operating incidence of the charge is solely the act of enplaning upon a commercial airline." Finding No. 23, R. 324. The enplanement of departing commercial air passengers at Dress Memorial Airport "cannot be realistically separated" from taxiing to the runway, takeoff, and landing in another state. Thus, a tax incident on enplaning is "in reality a condition of departure . . . into interstate commerce" (Finding No. 38, R. 327) and invalid under the Commerce Clause. See also *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359, 368 (1954) ("local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate ground for a state license, privilege or occupation tax"); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951) (tax on the privilege of conducting an interstate business); *Freeman v. Hewit*, 329 U.S. 249 (1946) (tax on the act of interstate sale itself).

The reason for the flat prohibition against direct taxes on interstate commerce is that there are no standards by which the reasonableness of the amount of such a tax can be measured. Therefore, sustaining the power to tax at all would imply that a state could tax at will and completely interdict the activity.

"The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines.

“* * * It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed.”

Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 276, 280 (1873).

Ordinance No. 33 also offends the Commerce Clause because it effectively discriminates against interstate commerce. Whether an exaction works a discrimination against interstate commerce is to be determined by an examination of its actual operation. “In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.” *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). *Accord, Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

Examination of the operating incidence of Ordinance No. 33 shows that it falls exclusively on a class of passengers, approximately 88 percent of whom are traveling in interstate commerce. Finding No. 16, R. 321; Pet. App. A 17. Among those, similarly situated in terms of use made of the airport, who are not subject to the levy are a substantial number whose activities are purely intrastate. In particular, these include non-travelers who visit the airport for the purpose of meeting or seeing off travelers or using restaurant, bar, car rental, air freight, or other facilities, as well as large numbers of noncommercial aviators and passengers. (Finding Nos. 19, 20, 26-27, R. 322-23, 325.)

It is clear that exempted groups using the airport include a substantial number of persons whose activities have no interstate ramifications and who are not required to pay the fee imposed by Ordinance No. 33 or any similar exaction. The Ordinance is no less discriminatory against interstate commerce because it may affect a small number of intrastate passengers or because it is not levied against all interstate passengers. It is enough that it is levied discriminatorily on a single group that consists predominantly of interstate passengers, and thus is discriminatory in its application or effect. *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

Ordinance No. 33 also discriminates against interstate commerce because, with all the other available sources of revenue, the Airport Board chose an incident of taxation which lends itself to repeated exactions in other states. If one state may tax enplanement, other states may tax deplanement and stopovers. Such multiple burdens would tend to fall much more heavily on long-distance and interstate travelers, in violation of the principle stated in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948):

"There are always convenient local incidents in every interstate operation. * * * The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce."

Id. at 87 (citation omitted).

Another line of cases supporting the decision below was apparently relied on by the trial court (R. 330)

and has been adopted by other courts which have considered the validity of similar state-imposed airport head taxes. *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, 154 Mont. 352, 463 P.2d 470 (1970); *Allegheny Airlines, Inc. v. Sills*, 110 N.J. Super. 54, 264 A.2d 268 (1970) (appeal dismissed). The leading case is *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), which rests on the right of United States citizens to travel freely among the States.¹ In *Crandall* this Court struck down a head tax strikingly similar to that imposed by Ordinance No. 33. The State of Nevada had levied a tax of one dollar upon every person leaving the state by railroad, stagecoach, or other vehicle engaged in transporting passengers for hire. The tax was to be collected by the carrier and reported monthly to the state. Crandall, agent of a stage company, was convicted for refusing to report the number of passengers carried and for nonpayment of the tax. In reserving his conviction, this Court did not consider the reasonableness of the amount of the tax but instead held there is an absolute ban on such

¹ The right to travel may be based in part on the Commerce Clause, but it is clear that that is not its sole foundation. It has been suggested that the right to travel is one of the privileges and immunities protected by the Fourteenth Amendment. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Edwards v. California*, 314 U.S. 160 (1941) (concurring opinions of Douglas, J., and Jackson, J.). The right to travel has been based on the Privileges and Immunities Clause of Article IV, Section 2. See *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 429-30 (1871); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). And it has been deemed to be an inherent premise of the federal concept of the Constitution. *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969); *United States v. Guest*, 383 U.S. 745, 757-58 (1966).

taxes which impinge directly on an integral aspect of interstate travel.

"* * * [I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."

Id. at 46 (emphasis added).

The apprehended evils underlying the decision in *Crandall* are also clearly present in Ordinance No. 33.

"* * * The exaction falls on the act of emplanement, which is equivalent to the act of departure and therefore is an integral aspect of interstate travel. If the state is empowered to tax the act of departure no inherent limits exist as to the amount of the charge. The right of the airport to tax the act of emplanement cannot logically be distinguished from the right of the airport to tax the act of deplanement. By the same token, arrival and departure taxes could be levied by airports at each point of intermediate stopover or transfer on a passenger's route. Since no rational basis exists for apportioning the right to tax arrival and departure among the various airports through which a traveler might pass, there is nothing to prevent the accumulation of crippling burdens on interstate air travel. Clearly the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling cumulative burdens on interstate travel."

Northwest Airlines, Inc. v. Joint City-County Airport Bd., 154 Mont. at 356, 463 P. 2d at 473. See also *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1948).

Finally, the decision below may also be supported on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment, as the trial court held. R. 331. The trial court also held that Ordinance No. 33 violates the Equal Protection Clause of the Indiana constitution, Article I, Section 23. R. 331.

II. A Decision in This Case by This Court Is Likely To Have Only Minor Impact Outside Vanderburgh County, Indiana

Contrary to Petitioners' unsupported assertion (Pet. 7) that a decision by this Court in this case would be "of far-reaching importance to all state and municipal taxing bodies where facilities are provided for interstate, as well as intrastate, commerce. . .," Respondents are aware of only one other state or local head tax which could conceivably be affected. At the time this lawsuit was commenced, there were three other state and local governments collecting or threatening to collect airport head taxes. Two of these taxes are now subject to permanent injunctions issued by judicial decrees which have become final. *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*;² *Allegheny Air-*

² Petitioners' statement (Pet. 6) that the Montana Supreme Court held in the *Northwest Airlines* case that there was no need for revenues to maintain and operate the Helena airport is diametrically opposed to the facts. The court stated:

"There is no issue before the Court as to the need for revenue to maintain and operate the Helena airport nor as to

lines, Inc. v. Sills. The only head tax case still pending is *Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, — N.H. —, 273 A.2d 676 (1971), Pet. App. C, where the New Hampshire Supreme Court upheld what it termed a service charge imposed on commercial air carriers (not passengers). Petitioners assert that the airlines are "virtually certain" to appeal that case to this Court and they appear to advance that as a principal reason for granting the writ in this case. Pet. 7. The undersigned, two of whom are also counsel to the airlines involved in the New Hampshire case, are able to advise this Court that no decision has been made on the question whether to appeal that decision. Since the New Hampshire statute affects a rather small number of passengers, and since a similar New Hampshire enactment went unchallenged for a number of years, the New Hampshire Supreme Court decision will have substantial import only if it encourages the enactment of similar head taxes by other states and localities. Accordingly, the decision whether to appeal in the New Hampshire case may be strongly influenced by this Court's disposition of the Petition in this case.

the propriety of raising revenues by assessing proper charges on the commercial air carriers using the airport. *There is a need for revenue to support the airport*, but many of the facilities, such as expensive runways, could be provided on a lesser scale were it not for the use of the port by commercial jets. However, even if legislation such as Chapter 281 seeks to achieve good and necessary ends, it must do so in a fashion not impinging on constitutional rights."

154 Mont. at 361, 463 P.2d at 475 (emphasis added).

CONCLUSION

For all of the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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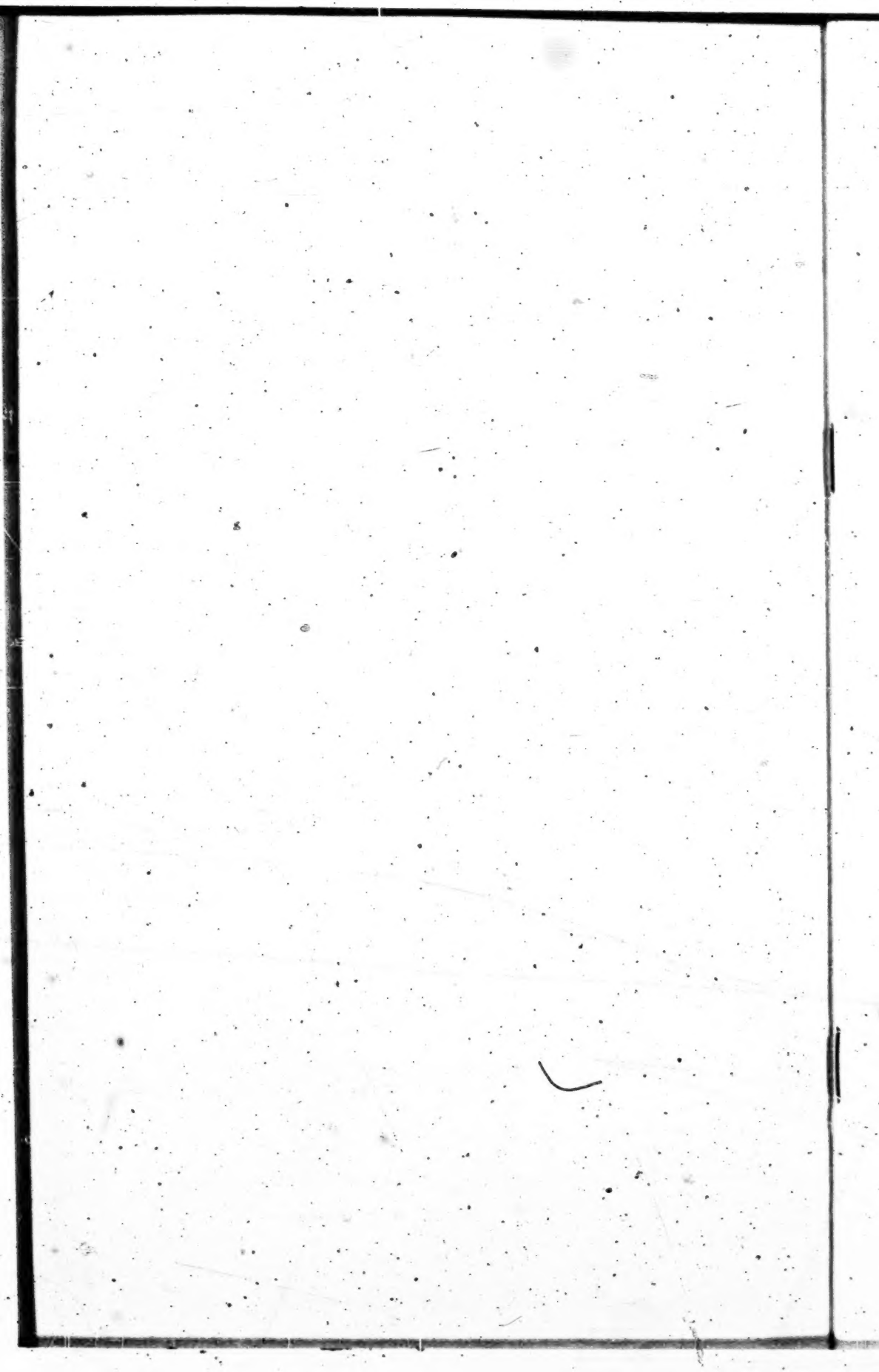
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Dated: April 13, 1971.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-99

EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, on behalf of himself and all other persons similarly situated,
Petitioners,

v.

DELTA AIRLINES, INC., EASTERN AIRLINES, ALLEGHENY AIRLINES, INC., and WILLIAM F. WOOD on behalf of himself and all other persons similarly situated,
Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

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IN THE
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OCTOBER TERM, 1971

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EVANSVILLE-VANDEBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, on behalf of himself and all other persons similarly situated,
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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

INTEREST OF AMICUS CURIAE

The National League of Cities represents, directly or through its affiliated state municipal leagues, approximately 15,000 of the 18,000 incorporated municipalities in the nation. As such, the National League of Cities is vitally interested in developments, be they local or national, which have broad ranging implications for municipal governments. The case at bar

and a related case, *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*, 110 N.H. —, 273 A.2d 676, *prob. juris. noted* Oct. 12, 1971, 40 U.S.L. Week 3161 (No. 1755, 1970 Term; renumbered No. 70-212, 1971 Term), represent such an issue of national interest because many cities own and operate airports and are facing increasing difficulty financing airports and all other municipal services. If localities are denied devices such as the passenger service charge which spread the burden of costly airport facilities necessary for commercial airline service more evenly among potential users, the National League of Cities is concerned that the end result will be a decline in the quality of the nation's airport system with direct injury to commerce and the ability of people to move from city to city.

Because of this concern the National League of Cities is filing a brief *amicus curiae* in support of Petitioners, Evansville-Vanderburgh Airport Authority District. In accordance with Rule 42(2), written consent has been received from all parties for the filing of this brief.

ARGUMENT

I. The Broadly Based Airport Financing Structure Provided by the Passenger Service Charge Is Necessary To Support and Improve Interstate Commerce and the Capacity of Citizens To Travel Freely.

Currently there are more than 2000 publicly owned airports in the nation,¹ of which more than 500 receive scheduled airline service.² Cities own and operate a significant number of these airports and many of these facilities operate at a deficit including the

¹ S. Rep. No. 91-565, 91st Cong. 1st Sess. 23 (1969).

² Air Transportation Assoc., *Air Transport* 1971, 21 (1971).

airport involved in the case at bar (R. 484 & 485). Though airports, particularly those served by the commercial airlines, are generally considered to be regional facilities serving many jurisdictions, Cf. *Airport Commission of Forsyth County, N.C. v. C.A.B.*, 300 F.2d 185 (4th Cir. 1962), the principal burden of supporting airports falls upon the taxpayers of the individual jurisdiction which owns the airport. Forty percent of the users of Dress Memorial Airport are non-residents of Vanderburgh County, Indiana where the airport is located (R. 485). The airport is clearly a regional facility serving large portions of Illinois and Kentucky as well as southwestern Indiana (R. 475). Though the airport is a regional facility, the record demonstrates that the full burden of that significant portion of airport costs which is not covered by airport revenues (R. 484 & 485) is covered entirely by the property tax payers within Vanderburgh County (R. 485).

In 1970 cities alone spent \$435,000,000 to maintain and improve their airports.³ While municipal expenditures increased overall by 12 percent from 1969 to 1970, city expenditures for airports increased by 21 percent and have more than doubled since 1967.⁴ The burden on individual cities supporting such regional facilities as airports is increasingly difficult to bear because of the growing municipal finance crisis which in 1970 resulted in an excess of expenditures over revenues of approximately \$2.6 billion⁵ and forced severe curtailment of many municipal services.

³ U.S. Bureau of the Census, *City Government Finances in 1969-70*, 5 (1971).

⁴ *Id.*

⁵ *Id.*

The adverse impact of the municipal finance crisis on airport development is noted with concern in a 1971 report of the scheduled airlines' trade association:

Financing airport development on the local level has become extremely difficult as hard-pressed cities and municipalities are faced with requirements for financing a growing number of public projects. This comes at a time when virtually all of the 23 large hub cities and many of the medium and small hub cities have a demonstrated need for new or expanded airport facilities.⁶

To achieve a more equitable sharing among all users of the burden of support for airport facilities required for commercial airline passenger service, the concept of the passenger service fee was developed and enacted into law in several states and localities. Subsequently passenger service fees with revenues dedicated to airport use were declared unconstitutional in *Northwest Airlines, Inc. v. Joint City-County Airport Board*, 154 Mont. 352, 463 P.2d 470 (1970) and the case at bar but upheld in *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*, *supra*, p. 1.

Sustaining the airlines' objections to the passenger service fee will continue imposition of costs of facilities for commercial air passenger service upon a few, while many who are benefitted escape the burden. Further, if the Respondents' objections are upheld, significant injury may result to interstate commerce and the individual citizen's freedom to travel which depends upon a high quality airport system. The municipal finance crisis will make taxpayers of jurisdictions which own and operate airports particularly reluctant to pay the increased amounts necessary to support these facilities and build new ones if they cannot

⁶ *Air Transport* 1971, *supra*, note 2, at 20.

be assured that all beneficiaries of airports are paying a more equitable share of costs than now is the case.

II. Commercial Airline Passenger Service Imposes Significant Costs Upon Airports Amply Justifying its Special Classification for Taxation and the Imposition of the Passenger Service Charge as Reasonable Under the Equal Protection Clause.

The Supreme Court has already recognized the special nature of commercial airline service in sustaining an ad valorem property tax applied to regularly scheduled airlines but not applied to other airport users, *Braniff Airways v. Nebraska*, 347 U.S. 590 (1954). Commercial airline passenger service imposes special duties and costs upon local airport operators for which they are fully justified in seeking compensation.

Many major capital facilities at Dress Memorial Airport are primarily for the accommodation of the commercial airlines and their passengers. The Stipulated Facts indicate that the Terminal Building would not be essential for operation of a non-commercial airport and is required only for use of persons traveling on commercial airlines (R. 480). The instrument and approach lighting systems also would not be required except for use by the commercial airlines (R. 481). To meet the needs of commercial airlines, airport runways are thousands of feet longer than otherwise would be necessary and require far more costly construction techniques, approximating \$200 per lineal foot compared to costs of \$25 per lineal foot to construct runways for private, noncommercial aircraft (R. 480 & 481). Dress Memorial Airport contains 1330 acres of real estate, while only 200 to 300 acres would be required for an airport for use by private, noncommercial aircraft (R. 481).

The Airport and Airway Development Act of 1970, 84 Stat. 219, imposed new duties upon airports served

by commercial airlines. Section 51 of the 1970 Act, 84 Stat. 234, 49 U.S.C.A. 1432, requires the Administrator of the Federal Aviation Administration to establish minimum safety standards for the operation of any airports served by commercial air carriers and to issue certificates of compliance to the airports. Commercial air passenger service will be ended at airports which cannot meet the safety standards. These requirements were imposed primarily to protect commercial air passengers. It is thus most appropriate that the commercial airline passenger have a role in financing the airport which must provide required safety services or no longer be available for his convenience.

The commercial airlines are also in large part responsible for the rapid proliferation in damage claims filed against airport owners since the landmark decision of *Griggs v. Allegheny County*, 369 U.S. 84 (1962) requiring airport owners to pay for damages caused by noise from aircraft overflights. "It is difficult to overestimate the impact of the *Griggs* decision. It came at a time of marked increase in property owners' complaints due to the gradual substitution by the commercial airlines of jet aircraft with their far more annoying noise characteristics for their previously all piston-driven fleets," Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 Urban Lawyer 175, 192 (1971). Under the *Griggs* doctrine awards as high as \$750,000 have been reported, Urban Lawyer, *supra*, 195.

Further, the *Griggs* doctrine may be expanded to hold airport owners liable for damages resulting from any aircraft operations at or near the airport, not just damages assignable to overflights. *Ferguson v. City of Keene*, — N.H. —, 279 A.2d 605 (1971) allowed recov-

ery of \$9500 in damages against the City of Keene, New Hampshire on the theory that a nuisance was created by noise generated in an area behind the plaintiff's house which was used as an aircraft warmup area at the airport. *Ferguson* is particularly significant for two reasons: 1. The plaintiff had received a settlement in 1957 for property taken in connection with airport expansion, but the complaint was for damages from noise of "prop-jet commercial flights" initiated at the airport in 1963 which the trial court had determined could not have been anticipated in the earlier settlement. *Id.* at 606. 2. The City of Keene, which has had these extra costs imposed by the commercial airlines' activities, is one of the parties which will gain some compensation if the passenger service fee is upheld in the related case of *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*, *supra*, p. 1.

Passenger volume directly affects the size and number of commercial aircraft using an airport, the required size of terminal facilities and the size and volume of the vast range of other services necessary to support airline passengers. When combined with field use payments which are generally assessed according to the size and weight of aircraft and which are levied at Dress Memorial Airport (R. 486), the passenger service fee becomes a most accurate measure to apportion the cost of the publicly supported facilities for commercial air passengers.

The equal protection clause of the Fourteenth Amendment requires that "in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made,' " *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966), *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

Under this test, the classification adopted by the Petitioners, passenger service of commercial airliners and acts relating to boarding those airliners, is easily within the requirements of the equal protection clause.

The passenger service charge also fully complies with the due process clause, for to comply with due process, "the simple but controlling question is whether the state has given anything for which it can ask return," *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 444 (1940). The substantial contributions to commercial airlines and their passengers in the case at bar are obvious.

III. The Passenger Service Fee Imposes No Constitutionally Prohibited Limitations on Freedom of Travel.

Since the decision in *Hendrick v. Maryland*, 235 U.S. 610 (1915) it has been clearly established that a state may impose a non-discriminatory charge for use of state facilities which benefit commerce even if that charge is imposed on those who cross state lines. In *Hendrick* the charge was ostensibly imposed upon a private motor vehicle, but the charge was clearly and directly to be paid by the individual owner as a condition of his interstate travel.

In the case at bar, as in *Hendrick*, *Huse v. Glover*, 119 U.S. 543 (1886); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) and many other cases allowing charges which affected interstate travel, the motive of the state action is to maintain and support interstate and intrastate travel by providing a fair and adequate financial base supporting facilities to serve the traveller.

In cases where the right to travel across state lines has been asserted to strike down an activity, the motive of that activity has been to restrict travel generally or

by a particular class of people, *Crandall v. Nevada*, 6 Wall. 35 (1868) struck down a head tax imposed on all persons travelling interstate by common carrier. It is easily distinguished from the passenger service fee cases first, because it specifically applied to interstate passengers only and second, because it was in no way intended to cover or relate to any costs incurred by the state in maintaining the facilities of commerce.

Other cases affirming the right to travel voided actions designed to tax or limit the travel of specific classes of people without justification for the classification; *The Passenger Cases*, 7 How. 282 (1849) and *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) immigrants; *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Edwards v. California*, 314 U.S. 160 (1941) indigents; *United States v. Guest*, 383 U.S. 745 (1966) non-whites.

The major cases involving restrictions of foreign travel, *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965) and *United States v. Laub*, 385 U.S. 475 (1967) all involved absolute bans on foreign travel by specific people or to specific places. Such absolute bans are not raised in the case at bar.

The passenger service fee is in no way intended as such a prohibited restriction on travel; and intent aside, it works no more of a restriction on travel than any other taxes and fees charged common carriers by states and localities and passed on to the passengers in the regular course of business. Such charges have already been upheld by this court in two cases applying to commercial airlines, *Braniff Airways v. Nebraska*, 347 U.S. 590 (1954); *Northwest Airlines, Inc.*

v. *Minnesota*, 322 U.S. 292 (1944). A recent District Court case has even upheld airport action imposing a fee expressly intended to restrict travel by general aviation, *Aircraft Owners and Pilots Ass'n v. Port Authority of New York*, 305 F. Supp. 93 (S.D.N.Y. 1969).

If indeed there is a constitutionally protected right to travel by air, then the passenger service fee is fully supportive of that right. It is hardly consistent with the equal protection clause of the Fourteenth Amendment to impose upon a few the full burden of subsidizing a facility protecting and supporting the air travel rights of many. The passenger service fee is designed to mitigate the heavy burden currently imposed upon the property taxpayers within Vanderburgh County and to spread the burden of the air travel facility more evenly among its beneficiaries.

IV. The Passenger Service Fee Fully Complies With the Tests for Allowable Taxation of Activities Relating to Interstate Commerce.

Regularly scheduled flights by the commercial airlines into a state or locality give sufficient situs for taxation of the airline to comply with the due process clause of the Constitution, *Braniff Airways v. Nebraska*, 347 U.S. 590 (1954). Further, though 88 percent of the air travel from Dress Memorial Airport is interstate in nature (R. 475) and the airlines involved in this case are interstate businesses, the activities relating to enplaning commercial airline passengers are clearly "a sufficient local incident upon which a tax may be based," *General Motors Corp. v. Washington*, 377 U.S. 436, 447 (1964). The substantial facilities and services required to allow the enplaning activity strongly establish its local incident.

Once sufficient connection is established between the taxing jurisdiction and the activity to be taxed, the parameters of permissible state and local taxation of activities related to interstate commerce have been generally established. "Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that: (1) the tax discriminated against interstate commerce in favor of intrastate commerce; (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; or (3) the amount of the tax exceeded fair compensation to the state," *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 544 (1950).

Measured against these tests, the passenger service charge is a permissible imposition upon an activity of interstate commerce.

1. The tax in no way discriminates between interstate and intrastate commerce. It is levied without regard to the ultimate destination of the enplaning passenger.

2. The service charge is not imposed on the privilege of doing an interstate business. Under the terms of Ordinance 33, a purely intrastate carrier, if one existed, would bear the same burdens as interstate carriers. The service charge is clearly a "contribution" for special facilities necessitated by commercial air passenger service. Such charges to cover the cost of improvements have been upheld even where imposed as a condition of using previously travelled but unimproved public ways (waterways), *Huse v. Glover*, 119 U.S. 543 (1886), and clearly can be imposed where, as

in the case at bar, local action in constructing a facility is essential for commerce to take place.

The intent that the passenger service charge be imposed to defray costs of the facility is confirmed by Sec. 5 of Ordinance 33 which requires that proceeds of the service charge be used solely for maintenance and improvement of the airport. Imposition of such service charges is also encouraged by Federal law which states that in order to receive grant-in-aid assistance:

the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection, 84 Stat. 229, 49 U.S.C.A. 1718(8).

3. The One Dollar (\$1.00) service charge is not in excess of fair compensation for use of the facility. As already indicated, commercial air passenger service requires costly facilities not otherwise needed. Further, the record indicates that even the revenues produced by Ordinance 33 plus other available sources are not adequate to cover the costs of capital improvements in existence or planned to serve commercial air passengers (R. 488 & 489).

Though the charges in the case at bar are "reasonable and fixed according to some uniform, fair and practical standard" as required by the commerce clause, *Hendrick v. Maryland*, 235 U.S. 610, 623 (1915), this "reasonableness" standard will prevent assessment of unreasonably high passenger service charges,

mitigating any concern that if one dollar can be charged one thousand dollars can be charged.

Interstate commerce cannot be subjected to the burden of multiple taxation, *Michigan-Wisconsin Pipe Co. v. Calvert*, 347 U.S. 157, 170 (1954). However, the taxpayer must bear the burden of proof of multiple taxation, and where that burden has not been sustained, the Court has refused to pass on the multiple taxation issue, *General Motors Corp. v. Washington*, 377 U.S. 436, 449 (1964), *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959). The record demonstrates no instance of multiple taxation. The reported cases on the passenger service charge display a striking similarity in adherence to a charge imposed according to enplaning passengers. In addition to the case at bar these include: *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*, *supra*, p. 1; *Northwest Airlines, Inc. v. Joint City-County Board*, 154 Mont. 352, 463 P.2d 470 (1970); and *Allegheny Airlines, Inc. v. Sills*, 110 N.J. Super. 54, 264 A.2d 268 (1970).

The potential for multiple taxation is minimized in these instances where boarding passengers are used as the measure of the tax.

CONCLUSION

The passenger service charge at issue in the case at bar is fully consistent with the requirements of equal protection and due process of law imposed by the Constitution. It is imposed to assure that those using public facilities built primarily for their benefit contribute fairly to the costs of such facilities. In so doing, it is consistent with many other cases which have upheld

the right of states and localities to impose a charge for use of airports, highways and other transportation facilities. These charges in no way infringe upon the right to travel, indeed they support this right by maintaining an adequate financial base for facilities serving travel and commerce.

Although there may be some who assert that the goal of the passenger service charge could be better served by other devices, it is long settled doctrine that amounts of charges and methods of collection are primarily matters to be determined by the states, and as long as they are reasonable and fixed according to a uniform and fair standard they will not be held a burden to interstate commerce, *Hendrick v. Maryland*, 235 U.S. 610, 623 (1915). Here the charge adopted after careful consideration by the Petitioners is similar in form to a tax adopted by three state legislatures. There can be little question of the care that went into its determination.

The Petitioners have created and maintained Dress Memorial Airport as a service to commerce. Without their action it would not exist. Without a broader base of financial support for the expensive air passenger facilities, the financing crisis of local government may prevent them from providing such high quality services in the future. Considering the increasingly more costly demands for services necessary to serve commercial air passengers, it is only proper that these passengers support a greater share of the costs through the passenger service charge.

The passenger service charge should be allowed to stand. The decision of the Indiana Supreme Court de-

declaring the passenger service charge unconstitutional
in the case at bar should be reversed.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99

**EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, KENNETH C. KENT,
ELMO HOLDER, ROBERT M. LEICH, IAN
F. LOCKHART, CLIFFORD K. ARDEN, JAMES
A. GEYER and PAUL E. HATFIELD, on behalf of
himself and all other persons similarly situated,**

Petitioners,

vs.

**DELTA AIRLINES, INC., EASTERN AIRLINES,
ALLEGHENY AIRLINES, INC., and WILLIAM
F. WOOD, on behalf of himself and all other
persons similarly situated,**

Respondents.

**ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF INDIANA**

BRIEF OF PETITIONERS

NOVEMBER 25, 1971

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**ORDINANCE NO. 33, EVANSVILLE-VAN-
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Passed on February 26, 1968	57
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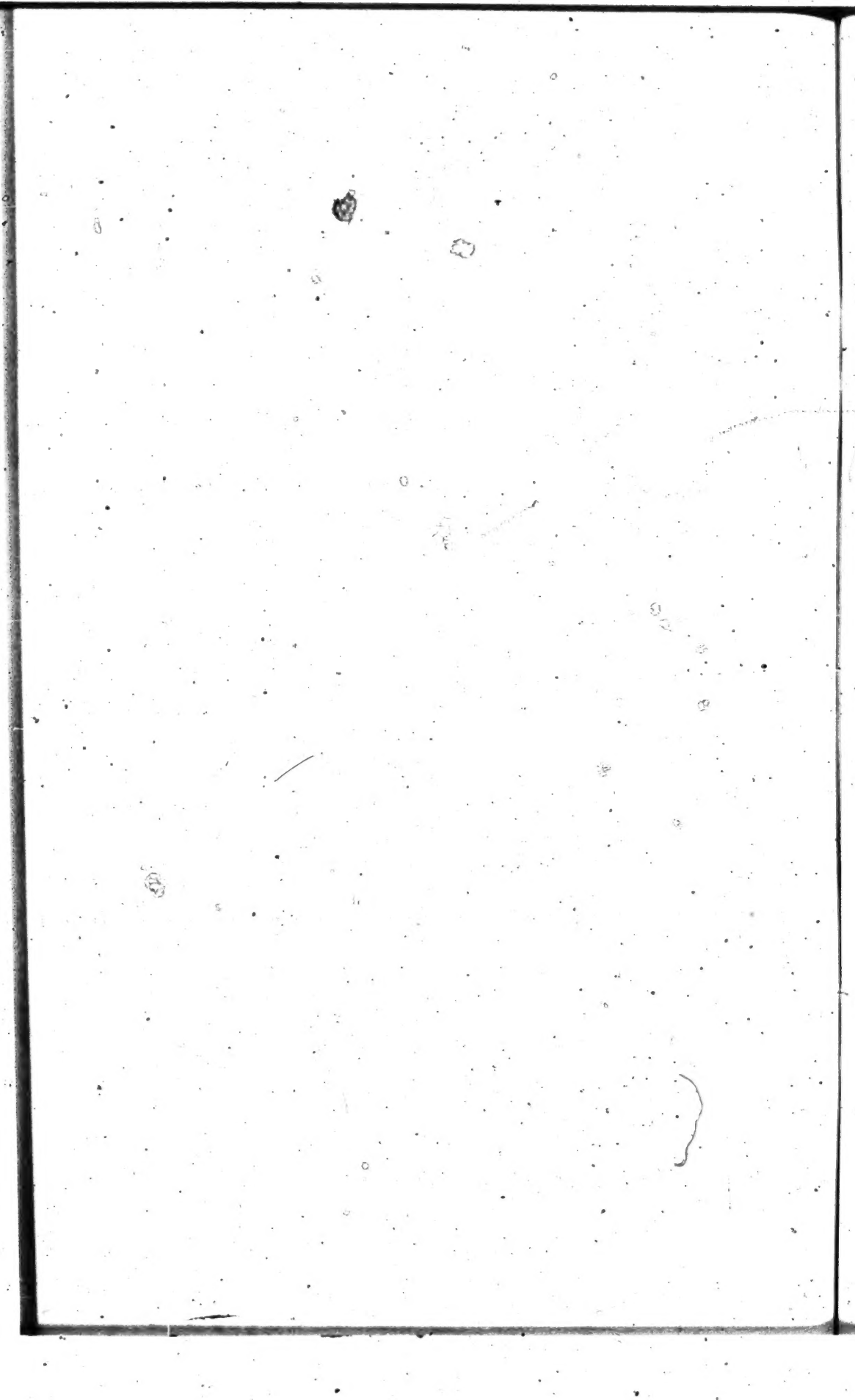
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I.C. 19-6-3-32; Burns, 14-1230	8, 15
I.C. 19-6-3-15(4); Burns, 14-1215(4)	9, 21
I.C. 19-6-3-28; Burns, 14-1227	9, 21

**ORDINANCE NO. 33, EVANSVILLE-VANDER-
BURGH AIRPORT AUTHORITY DISTRICT**

Passed on February 26, 1968	57
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99

EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, KENNETH C. KENT,
ELMO HOLDER, ROBERT M. LEICH, IAN
F. LOCKHART, CLIFFORD K. ARDEN, JAMES
A. GEYER and PAUL E. HATFIELD, on behalf of
himself and all other persons similarly situated,
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vs.

DELTA AIRLINES, INC., EASTERN AIRLINES,
ALLEGHENY AIRLINES, INC., and WILLIAM
F. WOOD, on behalf of himself and all other
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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF INDIANA

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of the State of
Indiana, Cause No. 869 S 179, was entered on Decem-
ber 23, 1970, and is reported in _____ Ind. _____, 265
N.E.2d 27 (1970). (A. 198) The unpublished opinion
and judgment of the Superior Court of Vanderburgh

County, Indiana, was entered nunc pro tunc as of May 8, 1969. (A. 189; R. 403-408)

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana was entered on December 23, 1970. Said Judgment was final and no petition or order respecting a rehearing was required or requested (*Southern Ry. Co. v. Clift*, 260 U.S. 316 (1923)), and no request or order for an extension of time within which to petition for Certiorari was filed, granted, or required.

The jurisdiction of this Court is invoked under 62 Stat. 929, 28 U.S.C. 1257(3). The Petition for Writ of Certiorari was filed herein on March 19, 1971, and Certiorari was granted on October 12, 1971.

THE QUESTIONS PRESENTED

1. Where an Airport, at its own expense, furnishes facilities for the use of those engaged in commerce; interstate as well as intrastate, is it authorized to collect a reasonable use and service charge from such commerce for the privilege of using and enjoying the Airport facilities and for the purpose of defraying the capital and operating costs thereof?

2. Is a use and service charge of One Dollar (\$1.00) imposed upon each enplaning commercial airline passenger by an Airport which, at great expense to its taxpayers, provides its facilities for the primary use and benefit of commercial airline passengers, a reasonable burden on interstate commerce under Article I, Section 8, Clause 3 of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Constitutional Provisions, Statutes and Ordinances involved are set forth at length in the Appendix to this Brief. The citations are as follows:

FEDERAL CONSTITUTION

Article I, Section 8, Clause 3, of the Federal Constitution

FEDERAL STATUTES

84 Stat. 219, 49 U.S.C. 1701
 84 Stat. 221, 49 U.S.C. 1712(a)
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 84 Stat. 226, 49 U.S.C. 1716(c)
 84 Stat. 234, 49 U.S.C. 1432
 84 Stat. 238, 26 U.S.C. 4261
 78 Stat. 161, 49 U.S.C. 1110

STATE CONSTITUTION

Article I, Section 1, Indiana Constitution

STATE STATUTES

References are to Indiana Code (I.C.) and Burns Indiana Statutes, Annotated (Burns).

I.C. 19-6-3-2; Burns, 14-1202

I.C. 19-6-3-3; Burns, 14-1203

I.C. 19-6-3-15, Clauses 9 & 16, Burns, 14-1215(9)(16)

I.C. 19-6-3-30; Burns, 14-1230

I.C. 19-6-3-15(4); Burns, 14-1215(4)

I.C. 19-6-3-28; Burns, 14-1229

ORDINANCE NO. 33, EVANSVILLE-VANDER- BURGH AIRPORT AUTHORITY DISTRICT

Passed on February 26, 1968

STATEMENT

This was an action brought by Respondents against Petitioners for a Restraining Order, Temporary Injunction and Permanent Injunction against the enforcement of Ordinance No. 33 of the Petitioner, Evansville-Vanderburgh Airport Authority District, enacted on February 26, 1968, which Ordinance established and, effective July 1, 1968, sought to impose a use and service charge of One Dollar (\$1.00) for each passenger enplaning commercial aircraft at Dress Memorial Airport, Evansville, Indiana, operated by the Petitioner Airport Authority. Respondents' Complaint was filed in four (4) pleading paragraphs, the first paragraph of which alleged that Petitioner's Ordinance No. 33 constituted an unreasonable burden on interstate commerce and was, therefore, in violation of Article I, Section 8 of the United States Constitution. (A. 5; R. 16)

Upon the filing of Respondent's Complaint on June 28, 1968, the Superior Court of Vanderburgh County, on the same date, issued a Restraining Order without Notice. (A. 2; R. 76) On February 21, 1969, the trial court, after extensive briefing and argument of counsel, issued a Temporary Injunction (A. 2; R. 312); incorporating therein special Findings of Fact and Conclusions of Law wherein the Court held that Ordinance No. 33 violated Article I, Section 8 of the United States Constitution. (A. 134; R. 314-333). On March 24, 1969, Petitioners filed their Answers to Respondents' Complaint wherein Petitioners denied that its Ordinance No. 33 constituted an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution (A. 158; R. 357-373), and on the same date Petitioners

filed their Counterclaim praying for a recovery under its use and service charge Ordinance against the Respondent airlines in accordance with the number of enplaning passengers which were expected to be enplaned during 1969, together with attorneys' fees and litigation costs. (A. 180; R. 353-356). On April 2, 1969, Respondents filed their Demurrer to appellants' counterclaim (A. 3; R. 374-378), which Demurrer was sustained on April 16, 1969. On April 17, 1969, Respondents filed their Motion for Summary Judgment (A. 184; R. 383-385) and on May 1, 1969, Petitioners filed their Motion for Summary Judgment. (A. 187; R. 388-389). Finally, on May 8, 1969, the Superior Court of Vanderburgh County sustained Respondents' Motion for Summary Judgment and overruled Petitioners' Motion for Summary Judgment and issued its permanent injunction enjoining the enforcement of the Petitioners' use and service charge Ordinance No. 33. (A. 13; R. 391-395). On July 11, 1969, said lower Court entered its Nunc Pro Tunc Judgment as of May 8, 1969, wherein the Court declared said Ordinance to be unlawful and unconstitutional under Article I, Section 8, Clause 3, of the United States Constitution. (A. 189; R. 403-408). Petitioners timely filed their Transcript and Assignment of Errors wherein Petitioners, among other things, preserved for appeal the question of the validity of said Ordinance under Article I, Section 8, Clause 3, of the United States Constitution. (A. 3; R. 1-8).

The decision of the Superior Court of Vanderburgh County was subsequently affirmed by the Supreme Court of the State of Indiana on December 23, 1970. (A. 198).

SUMMARY OF ARGUMENT

The Petitioner, Evansville-Vanderburgh Airport Authority District (hereinafter called "Airport"), as stipulated by the parties, is the legal body authorized by the Indiana Statutes to own, operate and maintain Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana. I.C. 19-6-3-2, Burns Indiana Statutes, Annotated, 14-1202. (A. 43; R. 470).

The remaining appellants, Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, Clifford K. Arden, were the Board Members of the Airport Authority at the time this litigation was initiated. James A. Geyer was the Airport Manager and Paul E. Hatfield was an intervening defendant who appeared in said litigation supporting the validity of the Ordinance involved in this appeal.

Hereafter, for convenience, reference will only be made to the "Airport" as the Petitioner, the principal party to this proceeding. Likewise, Respondents will hereafter be referred to as the "Airlines," since they are the principal party-Respondents to this appeal.

The specific question in this appeal involves the constitutionality of Airport's Use and Service Charge Ordinance No. 33 under the Commerce Clause, Article I, Section 8 of the Federal Constitution. The ordinance, enacted on February 26, 1968 to become effective on July 1, 1968, provides for a use and service charge of \$1.00 for each enplaning passenger of commercial airlines operated from Dress Memorial Airport. The charge is to be collected and remitted by the airlines each six months after deducting therefrom an administrative fee of six percent allotted to such airlines. The charge is not applicable to members of the armed services nor to passengers having an initial point of

departure at a locality other than Evansville and whose destination either terminates or has an intermediate stop at Dress Memorial Airport. All revenues derived from said ordinance are to be held in a separate fund for the purpose of defraying the present and future airport capital improvement and maintenance costs incurred at Dress Memorial Airport.

I.

AIRPORT IS AUTHORIZED TO ENACT A USER CHARGE

The legislative authority granted to Petitioner is clear. The Airport Authority District Act provides that Petitioner is empowered to:

- (a) Exercise legislative as well as executive powers. I.C. 19-6-3-3, Burns Indiana Statutes, Annotated, 14-1203;
- (b) Adopt a schedule of reasonable charges and to collect the same from users of facilities and services provided by the district. I.C. 19-6-3-15, Clause 9, Burns Indiana Statutes, Annotated, 14-1215, Clause 9;
- (c) Fix, charge and collect tolls, fees and charges to be paid for the use of all or any part of the airport, landing field and navigation facilities. I.C. 19-6-3-15, Clause 16, Burns Indiana Statutes, Annotated, 14-1215, Clause 16.

No question exists regarding the power of the legislature to confer and delegate to local executive or administrative governing bodies its power to fix rates and charges and to pass ordinances. *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939);

Southern Ry. Co. v Hunt, 42 Ind. App. 1, 83 N.E. 721 (1908).

II.

AIRPORT IS CHARGED WITH THE PRIMARY OBLIGATION OF PROVIDING SAFE FACILITIES FOR COMMERCE

The burden of providing safe facilities at Dress Memorial Airport for use by commerce is set forth and established in the Act creating the Petitioner Airport Authority. I.C. 19-6-3-2, 19-6-3-32, Burns Indiana Statutes, Annotated, 14-1202, 14-1230.

While the expansion and improvement of the national airport airway system is one which is declared to be of national importance by the recently passed Aviation Facilities Expansion Improvement Program enacted by Congress, the primary obligation to construct and maintain these facilities and to provide the necessary financing therefor remains with the Airport. 84 Stat. 234, 49 USC 1432.

Accordingly, the Federal Government has neither assumed the obligation of providing for Petitioner's airport facilities nor has it preempted Airport from pursuing its primary and ultimate obligation of providing safe facilities for commerce. Surely it cannot be said that local government should become the unpaid servant of interstate commerce.

III.

PETITIONER'S AIRPORT FACILITIES ARE DESIGNED AND MAINTAINED TO SERVE COMMERCE

Most of the facilities at Dress Memorial Airport

are designed primarily for use by commercial airlines and its passengers. (A. 53 & 54; R. 480). Such facilities include the Terminal Building, runway lengths, approach areas, taxi-ways, and ramp areas, as well as the instrument and approach lighting systems and the required real estate to maintain adequate facilities for commercial aviation. (A. 46, 47, 54 & 55; R. 480, 481). Further, commercial airline passengers, together with those persons who accompany or greet said passengers when they enplane or deplane at Dress Memorial Airport, constitute, numerically, the majority of persons who frequent the Terminal and related facilities of Petitioner. (A. 63; R. 489)

IV.

THE COST OF CONSTRUCTION AND MAINTAINING FACILITIES FOR COMMERCE IS SUBSTANTIAL

On December 31, 1967, Airport had a bonded indebtedness of 1.3 million dollars. (A. 52; R. 478) In 1962, Airport adopted a Master Plan for airport development at an estimated cost of 4.48 million dollars. (A. 53 & 54; R. 520) More recently, Airport consultants have recommended an additional 6.9 million dollar capital improvement program for Dress Memorial Airport, exclusive of expected federal participating funds. (A. 62; R. 485, 645) The revenues of Dress Memorial Airport, from all sources, have fallen considerably short of expenses, including maintenance, operating and bond retirement costs. (A. 58 & 59; R. 485) In the absence of revenues to be derived from Ordinance No. 33, such deficits can only be satisfied through ad valorem tax levies on real estate which are seriously limited by statute. I.C. 19-6-3-15(4) and 19-6-3-28, Burns Indiana Statutes, Annotated, 14-1215(4) and 14-1227.

The parties have stipulated that the initiation and fulfillment of the capital improvement program designed primarily for the safety, comfort and convenience of commercial airlines and its passengers, will require more revenue than can be produced by the maximum tax levies permitted by law and more revenues over and above those designed to be produced by Ordinance No. 33 in order to amortize the costs of such program. (A. 62 & 63; R. 488; 489)

V.

INTERSTATE COMMERCE MUST PAY ITS OWN WAY

The powers over interstate commerce not delegated to the Federal Government by the Constitution are reserved to the states. *Asbell v. Kansas*, 209 U.S. 251 (1908).

The Civil Aeronautics Act of 1938 does not exclude or preempt the sovereign powers of the states which may act within their respective jurisdictions until an act of Congress overrides all conflicting state legislation. *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590 (1954)..

Additionally, a reasonable charge exacted from commerce making substantial use of public airport facilities is sanctioned by federal statute, 78 Stat. 161, 49 U.S.C. 1110; *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*, ___ N.H. ___, 273 Atl. 2d 676 (1971).

Further, it is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of the state tax burden. *Huse v. Glover*, 119 U.S. (1886).

In the *Huse* case, *supra*, the Supreme Court held that the exaction of tolls for passage through artificial locks constructed at state expense is not an impost upon navigation, but represented a contribution toward those facilities provided for commerce and that the private inconvenience suffered by interstate commerce must yield to the public good.

The critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all. *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965)

Thus, where a state or local governing body, at its own expense, furnished special facilities for use of those engaged in commerce, both interstate and intrastate, it may exact compensation therefor and the amount and method of collection of such compensation is primarily for determination by the state or local governing body itself. *Hendrick v. Maryland*, 235 U.S. 610 (1914).

VI.

ORDINANCE NO. 33 DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The parties have stipulated that Ordinance No. 33 imposed a use and service charge of One Dollar (\$1.00) on all enplaning passengers of commercial airlines at Dress Memorial Airport, whether said enplaning passengers travel in interstate or intrastate commerce. (A. 48; R. 480)

If the charge imposed bears a reasonable relationship to the purpose for which it was created, it does not operate to impair interstate commerce and is not discriminatory. *Capitol Greyhound Lines v. Brice*, 339

U.S. 542 (1950); *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E.2d 862 (1961).

Not only is such a tax not discriminatory, but if the act can be sustained upon any reasonably conceivable basis, it must not be overthrown and any doubts must be resolved in favor of its constitutionality. *Richmond Baking Company v. Department of the Treasury*, 215 Ind. 110, 18 N.E.2d. 778 (1938).

VII.

THE BURDEN ON COMMERCE IS MINIMAL

The right of states to impose upon interstate commerce such charges as will reasonably defray the expenses of maintaining facilities furnished for commerce and which charges represent a fair contribution to the cost of construction of the same is well established. *Aero Mayflower Transit Co. v. R.R. Commissioners*, 332 U.S. 495 (1947).

The cry of multiple state burdens and taxation is of no avail. *Atlantic Gulf & Pac. Co. v. Gerosa*, 16 N.Y. 2d 32, 209 N.W.2d 86, appeal dismissed, 382 U.S. 368, (1966), *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The "national interest" in attempting to interdict state charges and taxation is illusory and not supported by the record in this appeal. The states are not made powerless to regulate and charge commerce reasonably for its facilities. On the contrary, such power is of such high local import as to justify such charges and, therefore, the purported conflict between federal and state regulations is not so strong as to outweigh the vital local interest requiring the imposition of such charges. *Panhandle Eastern Pipe Line Company v.*

Public Service Commission of Indiana, 332 U.S. 507 (1947.)

Some thirty-five (35) different states impose highway use taxes upon motor freight carriers for the purpose of financing state road and highway construction. (A. 83; R. 636) Such impositions and charges have repeatedly been held constitutional and valid. *Capital Greyhound Lines v. Brice*, supra; *Riss & Co. v. Bowers*, supra.

The airlines should enjoy no more immunity to the imposition requiring contributions to the cost of providing facilities for interstate commerce than motor carriers.

The charge is one ultimately to be borne by the consumer, whether the charge is denominated one for the purchase of airline tickets, a federal excise charge or a state or local governing body's use and service charge.

ARGUMENT

I

AIRPORT IS AUTHORIZED TO ENACT A SERVICE CHARGE

The Board of the Airport is empowered to exercise the executive as well as the legislative powers of the District provided for in the Airport Authority District Act. I.C. 19-6-3-3, Burns Indiana Statutes, Annotated, 14-1203.

Further, the Airport, pursuant to the Acts of 1959, Chapter 15, page 32, I.C. 19-6-3-15, Clause 9, Burns Indiana Statutes, Annotated, 14-1215, is authorized "...

to adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the District."

Clause 16 of said Statute also provides that the Airport shall have the authority "... to fix, charge and collect rentals, tolls, fees and charges, to be paid for the use of the whole or any part or parts of any such airports or landing fields and other air navigation facilities."

It has long since been held that the legislature may confer and delegate the power to adopt rules, by-laws and ordinances to local governing bodies or municipalities. *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939). Further, it has been established that the legislature has the right to delegate to an executive or administrative body its powers to fix rates. *Southern Ry. Co. v. Hunt*, 42 Ind. App 1, 83 N.E. 721 (1908).

The Airlines have stipulated that Airport's Ordinance No. 33 in question was adopted by the Airport Authority in accordance with the legal procedures required by Indiana law. (A. 63; R. 489)

It has been recognized by the courts in Indiana that there is no limitation under the Indiana Constitution as to the number of excise taxes which may be imposed by the Legislature. Such a tax has been defined as one which is imposed upon the exercise of a privilege or use within the state, the most common illustration of which is the use of the public highways, and is not governed by Article 1, Section 1, of the Indiana Constitution. *Miles v. Department of Treasury*, 209 Ind. 172, 199 N.E. 372 (1965), appeal dismissed, 298 U.S. 640.

II.

AIRPORT IS CHARGED WITH THE PRIMARY OBLIGATION OF PROVIDING SAFE FACILITIES FOR USE BY COMMERCE

No question in this appeal exists as to the responsibility and obligation of the Airport to establish, construct, maintain, operate and finance Dress Memorial Airport (A. 53; R. 470). The burden of providing for the safety of commerce using the facilities of Dress Memorial Airport rests upon the Petitioner. The burden of providing safe aircraft to be used by commerce is borne by the Respondent airlines. I.C. 19-6-3-2, 19-6-3-32, Burns Indiana Statutes, Annotated, 14-1202, 14-1230. The cost of financing and providing these facilities, whether the same be airport runways and related facilities must ultimately be borne equitably by those who make use of these facilities. The Airport should be entitled to charge reasonably for the use of its facilities, just as the airlines fix reasonable rates of compensation for carriage on their aircraft.

Neither the Federal Government nor the Respondent airlines have assumed any obligations to provide safe and adequate facilities for commerce at Dress Memorial Airport.

It should be noted that under the recently passed Aviation Facilities Expansion Improvement Program enacted by Congress, the Federal Government has not assumed the underwriting of airport facilities expansion, 84 Stat. 219, 49 U.S.C. 1701 et seq. In the congressional declaration of policy, the Congress declared that a substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the Postal Service and

the national defense. 84 Stat. 219, 49 U.S.C. 1701. Further, under said Aviation Facilities Expansion and Improvement Act, the Federal Government directed the preparation of a National Airport System Plan in order to anticipate the needs of public airports for at least a ten (10) year period (84 Stat. 221, 49 U.S.C. 1712a), to make grants for airport development by grant agreements to sponsors (84 Stat. 224, 49 U.S.C. 1714a) and further provided for the approval of all airport development projects by the secretary (84 Stat. 226, 49 U.S.C. 1716c). While the Federal Government declared that the adoption of a national airport plan was a public necessity and required a uniform developmental plan by each public airport to be approved by the Secretary of Transportation, the Federal Government did not, under this or any other legislative enactment, undertake to pay for the costs of improving and constructing airport facilities, thus requiring local municipalities and governmental bodies to provide their own financing for all or a substantial portion of airport facilities costs. It is important to note that before any airport serving air carriers can obtain an operating certificate from the Civil Aeronautics Board, such airport must satisfy prescribed minimum safety standards. (84-Stat. 234, 49 U.S.C. 1432)

Accordingly, it cannot be successfully advanced that Congress has preempted the field of airport construction, expansion and improvement. Thus, the primary and ultimate obligation remains upon local government. Surely, it cannot be that local government should become the unpaid servants of interstate commerce.

III.

**PETITIONER'S AIRPORT FACILITIES ARE
DESIGNED AND MAINTAINED TO SERVE
COMMERCE**

The submitted and stipulated facts of the parties to this litigation show, without equivocation, that Airport has expended and will continue to incur extensive obligations in order to provide safe and adequate facilities for commercial airlines and its passengers. As stipulated by the parties, most of the facilities at Dress Memorial Airport are designed for use by commercial airlines and its passengers, and would not be essential for noncommercial aircraft.

It is deemed essential to review the submitted and stipulated facts which support the foregoing statement.

- (10) The Terminal Building at Dress Memorial Airport is primarily designed for use by persons traveling on commercial airlines. (A. 53 & 54; R. 480)
- (11) Most of the facilities constituting the Terminal Building at Dress Memorial Airport would not be essential for the operation of a noncommercial airport except for the required use thereof by persons traveling on commercial airlines. (A. 54; R. 480)
- (12) The runway lengths, approach areas, taxiways and ramp areas of said Dress Memorial Airport would not be so extensive except for the requirement that the same be sufficiently extensive in order to accommodate commercial airline carriers and their passengers. (A. 54; R. 480)

- (13) The present existing runway lengths at Dress Memorial Airport are as follows:

Northeast-Southwest Runway 8023 feet

North-South Runway 5084 feet

East-West Runway 3502 feet

Each of the foregoing runways is 150 feet in width. (A. 54; R. 480)

- (14) Runway length requirements for private, non-commercial aircraft using Dress Memorial Airport or other airports similarly located and situated are as follows: a runway length of 3500 to 4000 feet would be required, and, while most noncommercial airports throughout the country have only one runway, it is desirable that there be constructed two runways of the same length, to-wit: 3500 to 4000 feet, which would constitute crosswind runways. Required construction for said runways would be a grass or other stabilized surface such as blacktop of approximately 3 inches in depth. (A. 54; R. 480) The required width of said runways would not exceed 50 to 75 feet. The cost of constructing said runways for private, noncommercial aircraft (aircraft weighing less than 12,500 lbs.) would be approximately \$25.00 per lineal foot, exclusive of actual ground costs. (A. 54; R. 481)

- (15) Present construction requirements established by the Federal Aviation Administration dictate that runways for use by commercial aircraft shall be of reinforced concrete, 12 inches in depth and not less than 150 feet in width. Present construction costs for such runways to serve commercial aircraft approximate \$200.00

perlineal foot, exclusive of actual ground costs.
(A. 55; R. 481)

- (16) The present real estate owned by the appellant, at the Dress Memorial Airport, consists of 1330 acres, whereas only approximately 200 to 300 acres of real estate would be required in order to maintain an airport for use by private noncommercial aircraft (aircraft weighing less than 12,500 lbs.). (A. 55; R. 481)
- (17) Dress Memorial Airport operates and maintains an instrument-lighting system and an approach lighting system for use by commercial airlines, both of which are costly to maintain and operate and would not be necessary in connection with use by private, noncommercial aircraft. (A. 55; R. 481)
- (37) Commercial airline passengers, together with those persons who accompany or greet said passengers when they enplane or deplane at Dress Memorial Airport, constitute, numerically, the majority of persons who frequent the terminal and related facilities at Dress Memorial Airport. This paragraph of the stipulation is not intended to encompass or include the frequency of use of Dress Memorial Airport facilities nor the specific facilities actually used by persons frequenting Dress Memorial Airport. (A. 63; R. 489)

In this appeal, the Airlines have also claimed that the use and service charge imposed by Ordinance No. 33 applies only to a "small sub-class of users." This position is untenable since the tax is designed to apply to all commercial airline passengers. While the Ordi-

nance is applicable to enplaning passengers, the effect of the use and service charge applies to all commercial passengers as is exhibited by paragraph (31) of the submitted and Stipulated Facts of the Airport, which provides as follows:

"That the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville." (A. 61, R. 487)

Thus, the respondents cannot claim nor do the facts support their unfounded charges that Ordinance No. 33 affects only a small sub-class of users of Dress Memorial Airport. The record is irrefutably to the contrary.

IV.

THE COST OF CONSTRUCTING AND MAINTAINING FACILITIES FOR COMMERCIAL AIRLINE EQUIPMENT AND ITS PASSENGERS IS SUBSTANTIAL

As of December 31, 1967, the Airport had a bonded indebtedness of \$1,335,000.00 (A. 52; R. 478). On September 24, 1962, the Airport's Board formally adopted a Master Plan for its airport wherein a development program for the years 1962-1971 was approved at an estimated cost of \$4,481,000.00 (A. 53, 74; R. 520). More recently, the Airport's consultants, on December 16, 1968, recommended an additional 6.9 million dollars in capital improvements for Dress Memorial Airport, said sum being Petitioner's anticipated share of the construction costs after deducting expected federal

participation funds. (A. 62; R. 485, 645) For the period from 1965 through 1968, the Airport's revenues, from all sources, fell considerably short of its operating budgets and bond retirement costs. In 1965, after application of its revenues towards its regular maintenance and operating budget, only \$9,735.30 was available for defraying, partially, Petitioner's bond costs which amounted to \$166,059.00, or an approximate deficit of \$156,000.00 (A. 58; R. 484) In the years 1966, 1967 and 1968, the approximate deficits were \$121,000.00, \$95,000.00 and \$107,000.00, respectively. (A. 58; R. 485) Presently, and until Ordinance No. 33 is declared valid and constitutional, these deficits can only be satisfied through ad valorem tax levies on real estate located in Vanderburgh County, Indiana, which are seriously limited by statute. I.C. 19-6-3-15, 19-6-3-28, Burns Indiana Statutes, Annotated, 14-1215(4), 14-1227.

In the years 1966 and 1967, there were, respectively, 120,197 and 146,955 enplaning passengers at Dress Memorial Airport. During both of said years there were approximately the same number of deplaning passengers at said airport. (A. 51 & 52, R. 478)

The adoption, initiation and fulfillment of said capital improvement programs, totalling more than \$11,000,000.00, which are primarily designed for the safety, comfort and convenience of commercial airlines and its passengers, will require more revenue than can be produced by the maximum tax levies now permitted by law to be made by the Airport and will require additional revenues, in excess of those designed to be produced by Ordinance No. 33, in order to amortize the costs thereof. (A.62 & 63, R. 488, 489)

Thus, it is virtually impossible to maintain and pro-

vide for the future safety and convenience of commerce without requiring commerce, itself to bear its fair share of the burden of supporting the facilities which are used and enjoyed by such commerce. The financial plight of Petitioner is particularly acute when, admittedly, approximately forty percent of the users of Dress Memorial Airport are non-residents of Vanderburgh County who do not own property in said County. (A. 59; R. 485) Such facilities, without a user charge, are, therefore, unjustifiably enjoyed, without charge, by thousands of users outside of Vanderburgh County, Indiana.

V.

INTERSTATE COMMERCE IS NOT IMMUNE FROM STATE REGULATIONS AND MUST PAY ITS OWN WAY

The Airlines complain that a charge imposed upon airline passengers before they have enplaned is an unreasonable burden upon interstate commerce; they assume that persons who pay the charge have entered the stream of interstate commerce and are thus immune from the exaction of a use or service charge. Respondents, however, do not consider the possibility that the circumstances upon which the charge is based is the use of the airport facilities before the enplaning passengers have entered commerce.

McGOLDRICK v. BERWIND-WHITE COAL
309 U.S. 33 (1940);

UTAH POWER & LIGHT CO. v. PFOST,
286 U.S. 165 (1932);

INTERNATIONAL HARVESTER CO. v.
DEPARTMENT OF TREASURY, 322 U.S.
340 (1944).

But even assuming, as the Airlines do, that enplaning passengers are in interstate commerce, the mere fact that a subject is within the sphere of congressional power over commerce does not necessarily take it out of the reach of state regulation and taxation. It was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state tax burden.

HUSE v. GLOVER, 119 U.S. 543 (1886).

The *Glover* case was a land mark case growing out of an Act of the Illinois Legislature creating a Board of Canal Commissioners and investing it with authority to superintend the construction of the locks and dams, to manage the same after construction, and to prescribe reasonable rates of toll for the passage of all vehicles through the locks. In this case, the Legislature provided that any surplus funds in excess of that which was necessary to maintain the locks would become a part of the State Treasury and General Revenue. After construction of the locks, which required an expenditure of several hundred thousand dollars, the constitutionality of the Act was questioned by a river navigation company claiming that the commerce clause of the Federal Constitution precluded the imposition of tolls upon interstate waterways. The Court in sustaining the constitutionality of the Act, at page 548, held as follows:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It

did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the State greater benefit would result to her commerce by the improvement made than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad and many other works in which the public is interested, may materially diminish in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best

improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned.

SPOONER v. McCONNELL, 1 McLean 337;

KELLOGG v. UNION CO., 12 Conn. 7;

THAMES BANK v. LOVELL, 18 Conn. 7;

McREYNOLDS v. SMALLHOUSE, 8 Bush 447."

To render a state tax violative of the commerce clause, it must be shown to fall upon interstate commerce with an economic weight which is disproportionate to the burdens imposed upon intrastate commerce. No distinctions are made either in Ordinance No. 33 or in the practical effect of the charge. Further, the powers over interstate commerce not delegated to the federal government by the Constitution are reserved to the states.

ASBELL v. KANSAS, 209 U.S. 251 (1908);

HEAD v. NEW MEXICO BD. OF EXAMINERS, 374 U.S. 424 (1963).

It has likewise been held that the Civil Aeronautics Act of 1938 did not exclude or preempt the sovereign powers of the states and that if the federal government has not acted in the matter, the state may act within their respective jurisdictions until an act of Congress overrides all conflicting state legislation.

BRANIFF AIRWAYS, INC. v. NEBRASKA STATE BOARD OF EQUALIZATION & ASSESSMENT, 347 U.S. 590 (1954);

SHEBOYGAN AIRWAYS, INC. v. INDUSTRIAL COM., 209 Wis. 353, 245 N.W. 178 (1932);

VARNEY AIRLINES, INC. v. BABCOCK, 1 Fed. Supp. 687 (S.D. Idaho) (1932).

While the foregoing cases characterized local state or municipal legislation as being "conflicting state legislation" it is clear to the Airport that the enactment of the subject use and service charge is not, in any manner, conflicting with any federal legislation whatsoever. While there exists federal excise taxes which are imposed upon all airline tickets purchased by commercial airline passengers for the purpose of funding federal grants and projects (84 Stat. 238, 26 U.S.C. 4261), it is no different from gasoline and highway use taxes imposed by a local governing body. Both are designed to defray the costs of providing the facilities which are used by commerce.

Until recently, there were no authorities dealing with a use and service charge similar to that established by Ordinance No. 33. Other than the opinion of the Indiana Supreme Court declaring the subject Ordinance unconstitutional under the commerce clause, Article I, Section 8, of the Federal Constitution, *supra*, there are only two State Supreme Court cases which have dealt with a service charge. In *Northwest Airlines, Inc. v. Joint City-County Airport Board*, 154 Mont. 352, 463 P.2d 470, (1970), the Supreme Court of Montana declared unconstitutional a state legislative enactment establishing a service charge of One Dollar (\$1.00) for each passenger enplaning air carriers at all publicly operated airports within the State. In the *Northwest* case, the Court found that there was no issue before the Court as to the need for revenues to maintain and operate the Helena Airport nor as to the propriety of raising revenues by assessing proper charges on the commercial air carriers using the Airport since the record did not support such a need. The *Northwest* case is, therefore, clearly distinguishable in that the record of this appeal stipulates the need for

revenue to maintain and operate Dress Memorial Airport.

Subsequently, on January 29, 1971, the Supreme Court of New Hampshire, in the case of *Northeast Airlines, Inc. v New Hampshire Aeronautics Commission*, ___ N.H. ___, 273 Atl. 2d 676 (1971), adopted a contrary view and held that a similar One Dollar (\$1.00) enplaning fee did not constitute an unreasonable burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution and further held that it did not regard the decisions of the Montana Supreme Court and the Indiana Supreme Court in the instant case, as controlling. The New Hampshire Court did not adopt the views which these latter cases expressed. The New Hampshire Supreme Court declared that the critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all, citing *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965).

Further, the Supreme Court of New Hampshire stated that even a reasonable charge to federal instrumentalities making "substantial" use of public airport facilities is sanctioned by Federal Statute, citing 78 Stat. 161, 49 U.S.C. 1110. Accordingly, the Court concluded that the enplanement fee was what it purported to be, a fee for the use of facilities furnished by the public and that its incidence depends upon an event which is wholly intrastate, namely the enplanement of passengers within the State of New Hampshire at a facility publicly provided or supported; that the burden upon the carriers was minimal, and did not exceed reasonable compensation for the use provided.

There are many instances in which state charges have been levied against motor carriers operating in

interstate commerce. Appellant's Submitted Facts No. 30 (A. 60 & 61; R. 486) singles out no less than thirty-five (35) states which are presently imposing fuel and highway use taxes on interstate carriers. The right of the states to impose upon motor vehicles using highways in interstate commerce such charges as will reasonably defray the expenses and represent a fair contribution to the cost of constructing and maintaining those highways is long and well established.

**AERO MAYFLOWER TRANSIT CO. v.
RAILROAD COMMISSIONERS, 332 U.S.
495, 503 (1947).**

State taxes on interstate carriers which are designed to compensate the state for the privilege of using its roads or for the cost of administering state traffic regulations are not violative of the commerce clause of the Federal Constitution.

**CAPITOL GREYHOUND LINES v. BRICE,
339 U.S. 542 (1950).**

Further, a charge is not invalid and is not considered to be an undue burden on interstate commerce if it is reasonable and fixed according to uniform, fair and practical standards.

**SAFEWAY TRAILS, INC. v. FURMAN, 41
N.J. 467, 197 A.2d 366 (1964).**

In the celebrated case of *Hendrick v. Maryland*, 235 U.S. 610 (1914), the Supreme Court was called upon to examine the constitutionality of the state's right to regulate the registration and licensing of automobiles. It was contended that the Act of the Maryland Legislature violated the equal protection clause of the U.S. Constitution, the rights of citizens of the United States to pass into and through the state, and

attempted to regulate interstate commerce and impose an arbitrary tax. The Court, in striking down each of the contentions, held at 235 U.S. 622, 623 and 624 as follows:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved highways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. . . .

"In view of the many decisions of this court there can be no serious doubt that where a state at its

own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. . . ."

In the frequently cited *Minnesota Rate Case* (*Simpson v. Shepard*), 230 U.S. 353 (1912), the Supreme Court held, at page 402, as follows:

" . . . There necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the state should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce to pro-

vide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved."

VI.

ORDINANCE NO. 33 DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

While the Airlines have claimed that Airport's Ordinance No. 33 discriminates against interstate commerce and is, therefore, in violation of Article I, Section 8, Clause 3, the Commerce Clause of the Federal Constitution, such claim is not supported by the record. The underlying facts of this proceeding were all stipulated and no testimony, as such, was presented. The parties stipulated that Ordinance No. 33 imposed a use and service charge of One Dollar (\$1.00) on all enplaning passengers of commercial airlines at Dress Memorial Airport, whether said enplaning passengers travel in interstate or intrastate commerce. (A. 48; R. 480).

It is, therefore, immaterial to this appeal what percentage of enplaning passengers travel in interstate commerce as opposed to that percentage of enplaning passengers traveling only in intrastate commerce, since the Ordinance is designed to apply to all enplaning passengers, without discrimination.

In the recent case of *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E. 2d 862 (1961), the appellant interstate carrier instituted an action for a refund of Highway Use Taxes levied by the State of Ohio which were based upon the size of the motor carriers using the

highways, the number of axles of said vehicle as well as an average per mile rate specified by the Statute. The appellant interposed the same Constitutional objections under both the State and Federal Constitutions which the Respondents have raised in this proceeding. In upholding the constitutionality of the ordinance, the Ohio Supreme Court cited with approval the decision of the United States Supreme Court in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), wherein the court held that in determining the constitutionality of state taxes so far as exemptions, classifications and graduations in the amount of tax are concerned, the rule of construction must be one of rough approximation rather than precision. Further, the court held that the tax imposed bore a reasonable relationship to the purpose for which it was created, did not operate to impair interstate commerce and was not discriminatory. See also:

KAPLAN TRUCKING COMPANY v. BOWERS, 168 Ohio St. 141, 151 N.E. 2d 654 (1958);

ALGER CO. v. BOWERS, 166 Ohio St. 427, 143 N.E. 2d 835 (1957)

wherein the constitutional validity of highway use taxes was upheld. Also, in the case of *State ex. rel. Interstate Motor Freight System, et al., v. O'Neill*, 104 Ohio App. 309, 149 N.E. 2d 24 (1957), the court held that the Ohio Highway Use Tax is levied, among other things, for the purpose of constructing and reconstructing highways in attempting to make it possible for those traveling highways with heavy vehicles to help pay for the highways which they use without regard to whether those carriers are licensed in some other jurisdiction or in Ohio.

Similarly, in the matter of *Public Service Coordinated Transport v. State Tax Commission*, 6 N.Y. 2d 178, 160 N.E. 2d 448 (1957), wherein the appellant, interstate carrier, likewise sought a refund, the Court held, at pages 451, 452, that:

"... the purpose of the omnibus tax was to require interstate carriers to make some contributions to the maintenance of the highways which they are using. It requires no special discussion that a tax for such a purpose is constitutionally permissible.

"... The imposition of this tax in the same section under which domestic carriers are taxed demonstrates the absence of any intention to discriminate against interstate commerce."

STATE OF MAINE v. GRAND TRUCK R. CO.,
142 U.S. 217 (1891);

NATIONAL LEATHER CO. v. MASSACHUSETTES, 277 U.S. 413 (1928);

CANTON R. CO. v. ROGAN, 340 U.S. 511,
(1951);

NORTHWESTERN STATES PORTLAND CEMENT CO. v. STATE OF MINNESOTA, 358 U.S. 450 (1959);

VARNEY AIRLINES, INC. v. BABCOCK, 1
Fed. Supp. 687 (1932).

It is to be noted in the instant case that the purposes of Ordinance No. 33 are designed to help amortize the capital improvement program which the Petitioner, Evansville-Vanderburgh Airport Authority District, has instituted. No attempt has been made to discriminate against interstate passengers since the use and service charge created applies equally to intrastate as well as interstate passengers. (A. 53; R. 480)

The Indiana Decisions on the foregoing points are also totally in accord. The case of *Richmond Baking Company v. Department of the Treasury*, 215 Ind. 110, 18 N.E. 2d 778 (1938), was a singularly important precedent as it pertains to this case. The action was filed by Richmond Baking Company against the Department of Treasury for the purpose of enjoining the enforcement of the Motor Vehicle Weight Act of 1937. Richmond Baking Company used twenty-five (25) motor vehicles in its business which operated in both intrastate and interstate commerce. The Act in question required that a license fee be paid upon certain motor vehicles, including trucks and trailers, of the kind owned and operated by the appellant and exempted other motor vehicles such as trailers pulled by passenger cars and passenger cars from the operation of the Act.

Richmond alleged, among other things, that the Indiana Act was discriminatory and in violation of Article I, Section 8 of the Federal Constitution in that it undertook to regulate commerce among the several states. Regarding the questions of discrimination and regulation of interstate commerce, the Court stated as follows:

"In the discussion of the law questions presented, the appellant admits that highways may be used for the transportation of persons and property for hire subject to special limitations and regulations, and that discrimination may be made between those using the highway for public purposes and those using them for hire in a classification for taxation, citing several United States decisions and *Kelly v. Finney*, 207 Ind. 557, 194 N.E. 157 (1935).

"This court must approach the consideration of the questions herein involved with a presumption in favor of the validity of the legislative act. If the act can be sustained upon any reasonably conceivable basis, it must not be overthrown. Even if there is doubt upon the question of the unconstitutionality of the act, that doubt must be resolved in favor of its constitutionality. *State ex rel. v. Billheimer* (1912), 178 Ind. 83, 88, 96 N.E. 801; *State ex rel. Duensing v. Roby et al.* (1895), 142 Ind. 168, 180, 41 N.E. 145; *Bush v. The City of Indianapolis* (1889), 120 Ind. 476, 483, 22 N.E. 422; *Brown v. Buzan* (1865), 24 Ind. 194, 196, 197.

"While it may be asserted that the highways of the state are open to use of all persons upon equal terms, nevertheless, such use is restricted by legislative enactment which may place a tax or license upon the users of the highways, and such users may be separated into classes and taxed differently if any reasonable basis exists for the classification. *Kersey v. City of Terre Haute* (1903), 161 Ind. 471, 473, 68 N.E. 1027; *Kelly v. Finney*, *supra*; *Continental Baking Co. v. Woodring* 1932, 286 U.S. 352, 52 S.Ct. 595, 76 L.Ed. 1155.

"The Legislature of this state, upon the sanction of the Court for many years, has recognized a distinction between freight trucks and passenger cars. They are constructed with a view of performing different services and uses. Trucks may occasionally be used to serve the purpose of a passenger car. Likewise, passenger cars infrequently may be used to serve the purpose of trucks, but the ordinary and normal uses of such motor vehicles

are entirely different. Trucks normally are constructed for the primary purpose of bearing a load, and passenger vehicles for the purpose of carrying passengers. In *Continental Baking Co. v. Woodring*, supra, the Supreme Court of the United States said, page 373:

"The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction."

"The highways are public property. It is within the power of the state to require users of these highways to contribute to their cost and maintenance, and to require those who make special use thereof to contribute to their upkeep. The distinction between commercial motor vehicles and pleasure cars has been recognized from the beginning of their use. Such regulation tax or fee is not a burden upon interstate commerce which applies alike to commercial vehicles, whether engaged in intrastate or interstate commerce. *Hendrick v. Maryland* (1915), 235 U.S. 610, 624, 35 S.Ct. 140, 59 L.Ed. 385."

Also, in the case of *Kersey v. City of Terre Haute*, 161 Ind. 471, 68 N.E. 1407 (1903), the Supreme Court of Indiana, some sixty-six years ago, passed on the same issues raised by the Airlines in this proceeding.

In the *Kersey* case, the City of Terre Haute, through

its Common Council, imposed a tax to be paid by owners of certain vehicles using the public streets of the city. The ordinance in question provided for the payment of annual fees by certain vehicles using the public streets and the revenue to be derived therefrom was to be used for the maintenance and repair of the streets and alleys of the City of Terre Haute. Kersey, along with six other persons suing for themselves and on behalf of five thousand others alleged to be similarly situated, sought to enjoin the enforcement of the ordinance and, while Mr. Kersey was successful in enjoining the ordinance in the lower Court, the Supreme Court reversed in favor of the constitutionality thereof.

The Court, at pages 310 and 311 of said opinion, further held as follows:

"Under such circumstances there is nothing unjust or wrong in a city, when so empowered by the legislature, requiring the payment of a properly or reasonably graduated tax, as in the case at bar, which must be considered in the nature of a toll imposed for the exercise of the privilege of using the streets by means of vehicles. In fact, the right of exacting the payment of such a license tax is akin to the principle by which the establishment of toll roads over public highways by virtue of legislative authority, and the right to collect toll from persons traveling in vehicles thereon, is sustained. The legislature of this State has the right, and in the past has exercised the same, to authorize a turnpike company to lay out its road over a public highway, and to exact toll from those who drive vehicles thereon. While every person, under like circumstances, has the right to use such turnpike

as a highway, nevertheless for the privilege of doing so he must pay the reasonable tribute or toll laid on all travelers alike. *Elliott, Roads and Sts.* (2d ed.), Section 71; *Cooley, Taxation* (2d ed.), 130; *Angell, Highways* (3d ed.), Section 8.

The rationale of the *Richmond* case, *supra*, as supported by the hold in *Kersey*, *supra*, is genuinely applicable to the questions raised regarding the constitutionality of Ordinance No. 33. The Stipulated and Submitted Facts already reviewed at length show clearly that Dress Memorial Airport and its facilities are primarily designed for the use and convenience of commercial airlines and its passengers. The distinction between private and commercial users is real, just as the distinction exists, in the case of highways, between freight trucks and passenger cars. Thus, Airport's runways, taxiways and related facilities are, literally, the "highways" of commercial air travel.

VII

THE "BURDEN" ON COMMERCE IS MINIMAL AND NOT UNREASONABLE

As stated heretofore in this brief, Interstate Commerce is not immune from the exaction of a use and service charge. The "burdens" upon the airlines and its passengers under Ordinance No. 33 are really no different than those which are imposed by some thirty-five other states which collect highway use taxes under a variety of formulae based upon the type and size of commercial vehicles employed on state highways and the extent of highway use. The right of states to impose upon motor vehicles using highways in interstate commerce such charges as will reasonably defray the expense of maintaining such highways and repre-

sent a fair contribution to the cost of constructing the same is long and well established. *Aero Mayflower Transit Co. v. Railroad Commissioners*, 332 U.S. 495, 503 (1947). The fact that one commercial carrier may compute taxes payable in thirty-five different ways, is of no consequence.

Nor does the cry of "multiple State burden and taxation" affect the constitutional validity of Ordinance No. 33. A similar contention was unsuccessfully advanced in the case of *Atlantic Gulf & Pac. Co. v. Gerosa*, 16 N.Y. 2d 1, 261 N.Y.S. 2d 32, 209 N.E. 2d 86 (1965), appeal dismissed, 382 U.S. 368 (1966), and the Court held that the city's use tax law was not an unconstitutional burden upon interstate commerce because of the possibility of multiple state taxation. See also:

SOUTH PACIFIC CO v. GALLAGHER, 306 U.S. 167 (1939);

HENNEFORD v. SILAS MASON CO., 300 U.S. 577 (1937);

HALLIBURTON OIL WELL CEMENTING CO. v. REILY, 373 U.S. 64 (1962).

In the *Henneford* case, *supra*, the Supreme Court ruled that a use tax does not hamper interstate commerce or discriminate against it, and declared, with respect to the possibility of multiple taxation, that it will be time enough to mark the limits of a state's taxing powers when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.

In addition, the case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), is of particular interest. In the *Panhandle* case, at page 522, the Court held, in respect to

certain regulations which the State of Indiana imposed upon the Appellant Pipe Line Company, that:

"As against these vital local interests, becoming more important with every passing year in the steady transition from use of more primitive fuels to natural gas and fuel oils, appellant seeks to set up its own interest in complete freedom from regulation and, if any is to be imposed, a supposed national interest in uniform regulation. The national interest, considered apart from its own, is largely illusory on this record. For itself, the company asserts that state regulation . . . will amount to a power of blocking the commerce or impeding its free flow.

"There are two answers. One is experience. Insofar as this phase of the natural gas industry has been subjected to state regulation to date, those effects have not been shown to occur. The other answer, in case that experience should vary, is the power of Congress to correct abuses in regulation if and when they appear. State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.

"Appellant also envisages conflicting regulations by the commissions of the various states . . . It assigns these possibilities in support of its view that national uniform regulation alone is appropriate to its operations. There is no evidence thus far of substantial conflict in either respect and we do not see that the probability of serious conflict is so

strong as to outweigh the vital local interests to which we have referred requiring regulation by the states . . .

"These considerations all would lead to the conclusion that the states are not made powerless to regulate . . . by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective."

Although various proposals have been made by Congress, no Federal statutory enactment or regulation has been enacted or promulgated which prohibits the states from establishing a use and service charge for enplaning passengers. Until such time as Congress acts in this matter, the use and service charge must be upheld.

The airlines and their passengers are in no more favorable position under the Constitution than are interstate motor carriers, and it ill behooves the airlines to assert a "hands off" position on behalf of their passengers while others similarly situated must pay their fair share of the state burdens incurred in providing facilities for commerce. The airline industry certainly is no larger than the motor carrier systems in the United States and should not be permitted to enjoy any unwarranted sanctuaries.

The airlines have assumed that they, themselves, have somehow been bridled with the burden of paying this charge. It must repeatedly be emphasized that the Ordinance No. 33 does not place this imposition upon the airlines, but their enplaning passengers. Under the

circumstances, it is difficult to imagine how the Airline can justifiably complain, particularly where the airlines have been allowed, by the terms of Ordinance No. 33, an administrative charge of six percent for collecting and remitting the use and service fee. In this connection, the designation of retail merchants as agents for the collection and remittance of retail sales taxes collected from the purchaser has been held constitutional, even where the retail merchants are not compensated therefor. *Welsh v. Sells*, 244 Ind. 423, 192 N.E. 2nd 753 (1963).

CONCLUSION

The enactment of Ordinance No. 33 by the Airport establishing a use and service charge to be paid by enplaning passengers, collected by the airlines and remitted to the Petitioner is, perhaps, new to the field of commercial aviation. However, the concept of a user charge is not unique and as demonstrated in this brief, is one which has been upheld by the Supreme Court as early as 1886 in *Huse v. Glover*, *supra*. Thus, the question involved in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all. *General Motors Corp. v. District of Columbia*, *supra*.

The user charge, in this case, is not an impost upon interstate commerce, but a charge which is reasonably designed and represents a fair contribution to the cost of constructing and maintaining valuable airport facilities primarily designed to be used by commercial airlines and its passengers.

The exaction of user charges is, without doubt, fair and just, because it requires commerce, literally, to pay its own way, whether such commerce be interstate or

intrastate. Indeed, whatever private inconvenience results to the airlines is insubstantial and must yield to the public good.

As stated in this brief, the validity of Federal and State gasoline taxes, as well as the exaction of Federal excise taxes on airline tickets, is now unquestioned. Nor should the Airport's Ordinance be subject to question, particularly in view of the fact that the airlines, by the very terms of the Ordinance, are being paid for their administrative costs in collecting and remitting these charges.

The question presented to this Court for review is one of grave and vital importance to the preservation of the right of states, municipalities and local governing bodies to require interstate, as well as intrastate, users of its facilities "to pay their own way" for the use of facilities which are provided, at great expense, for the use and benefit of commerce. The decision of the Indiana Supreme Court declaring Ordinance No. 33 unconstitutional under the Commerce Clause of the Federal Constitution is unwarranted and results in a deprivation of and an intrusion into the rights of states, municipalities and local governing bodies to charge equitably for facilities which are substantially used and enjoyed by commerce. The failure of this Court to grant to the states, municipalities and local governing bodies the right to charge reasonably for the use of its facilities for the purpose of providing for the present and future safety of commerce will impose an oppressive servitude upon such governmental bodies to commerce.

WHEREFORE, Petitioner prays that the Court:

(1) Declare Ordinance No. 33 to be valid and con-

stitutional under the Commerce Clause, Article I, Section 3, of the Federal Constitution;

- (2) Reverse the decision of the Indiana Supreme Court declaring said Ordinance No. 33 unconstitutional;
- (3) Remand this proceeding to the Indiana Supreme Court for the purpose of ordering the Respondent airlines to collect and remit the use and service charges provided for by said Ordinance, retroactively to July 1, 1968, and to pay a reasonable attorney's fee for Petitioner's counsel as well as the Court costs incurred in this litigation.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

FEDERAL CONSTITUTION

ARTICLE I, SECTION 8, CLAUSE 3:

Section 8. POWERS OF CONGRESS.

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

FEDERAL STATUTES

84 Stat. 219, 49 U.S.C. 1701:

Section 1701. Congressional declaration of policy

The Congress hereby finds and declares—

That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958, should be no less than \$250,000.00.

That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this chapter should be \$2,500,000,000.

84 Stat. 221, 49 U.S.C. 1712(a):

Section 1712. National airport system plan—
Formulation

(a) The Secretary is directed to prepare and publish, within two years after May 21, 1970, and thereafter to review and revise as necessary, a national airport system plan for the development of public airports in the United States. The plan shall set forth, for at least a ten-year period, the type and estimated cost of airport development considered by the Secretary to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, to meet requirements in support of the national defense as determined by the Secretary of Defense, and to meet the special needs of the postal service. The plan shall include all types of airport development eligible for Federal aid under section 1714 of this title, and terminal area development considered necessary to provide for the efficient accommodation of persons and goods at public airports, and the conduct of functions in operational support of the airport. Airport development identified by the plan shall not be limited to the requirements of any classes or categories of public airports. In preparing the plan, the Secretary shall consider the needs of all segments of civil aviation.

84 Stat. 224, 49 U.S.C. 1714(a):

Section 1714. Airport and airway development program—General authority

(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following:

(1) For the purpose of developing in the several states, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, airports served by air carriers certified by the Civil Aeronautics Board, and airports the primary purpose of which is to serve general aviation and to relieve congestion at airports having a high density of traffic serving other segments of aviation, \$250,000,000 for each of the fiscal years 1971 through 1975.

(2) For the purpose of developing in the several states, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, airports serving segments of aviation other than air carriers certified by the Civil Aeronautics Board, \$30,000,000 for each of the fiscal years 1971 through 1975.

84 Stat. 226, 49 U.S.C. 1716(c)

Section 1716. Project applications for airport development—Submission

(c) (1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal au-

thority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provisions for installation of the landing aids specified in subsection (d) of section 1717 of this title, and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wild-

life, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to having adverse effect unless the Secretary shall render a finding in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

84. Stat. 234, 49 U.S.C. 1432:

Section 1432. Airport operating certificates—
Power to Issue

(a) The Administrator is empowered to issue airport operating certificates to airports serving air carriers certified by the Civil Aeronautics Board and to establish minimum safety standards for the operation of such airports.

(b) Any person desiring to operate an airport serving air carriers certified by the Civil Aeronautics Board may file with the Administrator an application for any airport operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this chapter and the rules, regulations and standards prescribed thereunder, he shall issue an airport operating certificate to such person. Each airport operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation including but not limited to, terms, conditions, and limitations relating to—

(1) the installation, operation, and maintenance of adequate air navigation facilities; and

(2) the operation and maintenance of adequate safety equipment, including firefighting and rescue equipment capable of rapid access to any portion of the airport used for the landing, take-off, or surface maneuvering of aircraft.

84 Stat. 238, 26 U.S.C. 4261:

Section 4261. Imposition of tax

(a) In general.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person which begins after June 30, 1970, a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

(b) Seats, berths, etc.—There is hereby imposed upon the amount paid for seating or sleeping accommodations in connection with transportation which begins after June 30, 1970, and with respect to which a tax is imposed by subsection (a), a tax equal to 8 percent of the amount so paid.

(c) Use of international travel facilities.—There is hereby imposed a tax of \$3 upon any amount paid (whether within or without the United States) for any transportation of any person by air, if such transportation begins in the United States and begins after June 30, 1970. This subsection shall not apply to any transportation all of which is taxable under subsection (a) (determined without regard to sections 4281 and 4282).

(d) By whom paid.—Except as provided in section 4263(a), the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

(e) Reduction, etc. of rates.—Effective with respect to transportation beginning after June 30, 1980—

(1) the rate of the taxes imposed by subsections

(a) and (b) shall be 5 percent, and

(2) the tax imposed by subsection (c) shall not apply.

78 Stat. 161, 49 U.S.C. 1110:

Section 1110. Project sponsorship; requirements; contracts between Administrator and public agencies; relief of sponsors

As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future aircraft hazards;

(4) appropriate action, including the adopting of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft;

(5) all the facilities of the airport developed

with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(8) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(9) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, consistent with the terms of this chapter, as he may deem necessary. Among other steps

to insure such compliance the Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this chapter to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (6) of this section.

STATE CONSTITUTIONAL PROVISIONS

Article I, Section 1:

Section 1. Natural Rights.—WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable rights; that, among these are life, liberty and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

STATE STATUTES

I.C. 19-6-3-2; Burns, 14-1202:

14-1202. Creation of airport district.—Whenever the council of any city having a population of 128,000 or more and being in a county with a population of not less than 150,000 and not more than 180,000 according to the last preceding United States cen-

sus, or the council of such city and the council of any county in which such populated city exists, shall after the taking effect of this act (Sections 14-1201—14-1235) adopt an ordinance, an act or a resolution in favor of the establishment of an airport authority district under the provisions of and in accordance with the provisions of this act, for the purpose of acquiring, improving, operating, maintaining and financing an airport or landing fields, there shall be established an airport authority district for the area coterminous with the jurisdictional boundaries of the council or councils adopting and enacting such ordinance, act or resolution.

I.C. 19-6-3-3; Burns, 14-1203:

14-1203. Executive and legislative power. — The board of the airport authority district shall exercise the executive and legislative powers of the district and as provided by this act.

I.C. 19-6-3-15, Clauses 9 & 16, Burns, 14-1215(9)(16):

14-1215. Powers of the board.—In addition to the powers and duties conferred upon it elsewhere in this act (Sections 14-1201—14-1235), such board shall have full power and authority to do all acts necessary or reasonably incident to carrying out the purposes of this act including, but not in limitation thereof, the following:

* * *

9. To adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the district.

* * *

16. General Powers.

That the board may adopt and use a seal. That the

board shall have power and authority:

... to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of any such airports or landing fields, and other air navigation facilities . . . ; and to fix, charge and collect fees for public admissions and privileges; . . .

* * *

I.C. 19-6-3-32; Burns, 14-1230:

14-1230. Public necessity and benefit—General welfare.—The acquiring, establishment, construction, improvement, equipment and maintenance and the control and operation of airports and landing fields for aircraft under and pursuant to any of the provisions of this act (Sections 14-1201—14-1235) shall be deemed and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all the people of the state of Indiana, as well as of the people residing in any such district.

I.C. 19-6-3-15(4); Burns, 14-1215(4):

14-1215. Powers of the board.—In addition to the powers and duties conferred upon it elsewhere in this act (Sections 14-1201—14-1235), such board shall have full power and authority to do all acts necessary or reasonably incident to carrying out the purposes of this act including, but not in limitation thereof, the following:

* * *

4. To adopt an annual budget and levy taxes up to twelve cents (12¢) on each one hundred dollars (\$100) of assessed property within the district in accordance with the provisions of this act.

I.C. 19-6-28; Burns, 14-1227:

14-1227. Cumulative building fund.—The board is hereby authorized to provide a cumulative building fund to provide for the erection of buildings and runways or such other facilities, their addition or improvement on the airport, needed to carry out the provisions of this act (§§14-1201—14-1235). Whenever the board shall determine to provide such cumulative building fund, the board shall give notice thereof to the taxpayers affected thereby and provide for a public hearing on such proposal. Ten (10) days notice by publication of such proposal and of such public hearing in two (2) newspapers published within the territorial limits of the district shall be given. If, after such public hearing, the board determines that such cumulative fund shall be established, it shall adopt a resolution to that effect and submit the same to the state board of tax commissioners for approval. The state board of tax commissioners shall then, within a reasonable time, fix a date for hearing on said petition, which hearing shall be held within the territorial limits of said district at a date and place to be fixed by said state board of tax commissioners. The state board of tax commissioners shall give ten (10) days notice by publication of such hearing in two (2) newspapers published within the territorial limits of the district. Upon the approval of such resolution by the said state board of tax commissioners, the board shall have the power to levy annually for a period of time fixed in the resolution, not to exceed twelve (12) years, the tax as proposed not to exceed two (2) cents on each \$100.00 of taxable property, on all taxable property within the territorial limits of said district. As such tax is collected it may be invested in negotiable United States

bonds or other securities which the United States government has the direct obligation to pay. Such fund shall not be used for any other purpose than the purpose for which it was levied. Any of the funds so collected not invested in government obligations, as above provided, shall be deposited in the manner now authorized by law for the deposit and safekeeping of the general funds of municipalities and shall be withdrawn therefrom in the same manner as moneys are regularly withdrawn from such general fund but without further or additional appropriation. Such funds so collected shall not revert to the general fund.

**ORDINANCE NO. 33, EVANSVILLE-VAN-
BURGH AIRPORT AUTHORITY DISTRICT**

ORDINANCE NO. 33

**AN ORDINANCE ESTABLISHING AND FIXING
A USE AND SERVICE CHARGE FOR ALL EN-
PLANING PASSENGERS UTILIZING AIRPORT
PREMISES AND FACILITIES**

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boun-

daries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contri-

bute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

- (a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;
- (b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittances shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar (\$1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term 'each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport' shall not include, nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Van-

derburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:

/s/ Robert M. Leich
Robert M. Leich, Secretary

DEC 27 1971

E. ROBERT LEE, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY
DISTRICT, ET AL., *Petitioners*,

v.

DELTA AIR LINES, INC., ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR THE RESPONDENTS

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Dated: December 27, 1971

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OCTOBER TERM, 1971

No. 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY
DISTRICT, ET AL., *Petitioners*,

V.

DELTA AIR LINES, INC., ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported unofficially at 265 N.E.2d 27 and is reproduced at A. 198-207.¹ Neither the Findings of Fact and Conclusions of Law nor the *nunc pro tunc* judgment of the trial court has been officially reported, and they are reproduced, respectively, at A. 134-157 and A. 189-197.

¹ "A." refers to the printed Appendix filed in this Court under Rule 36.1. References to the original record are indicated by "R."

QUESTION PRESENTED

For reasons stated in the Argument, at p. 18 *infra*, the two questions posed by petitioners are more properly stated as one:

Does a municipal airport's exaction of one dollar for the act of enplanement by each commercial airline passenger constitute a violation of the Commerce Clause of the United States Constitution where the exaction is imposed directly on the passengers, 88 percent of whom are departing the airport into interstate commerce, without regard to any actual use they make of airport facilities, and where such passengers constitute a minority of all persons using such facilities?

STATUTES INVOLVED

U. S. Constitution, ART. I, § 8, cl. 3 (Commerce Clause) and Evansville-Vanderburgh Airport Authority District, Ind., Ordinance No. 33, Feb. 26, 1968 are set forth in Appendix A (pp. 49-52 *infra*).

SUPPLEMENTARY STATEMENT

A. Proceedings Below

Although petitioners' statement of the proceedings below is correct as far as it goes, it omits facts required to give an accurate picture of the procedural posture of this case. Plaintiffs Delta Air Lines, Inc., Eastern Airlines, Inc. and Allegheny Airlines, Inc. (respondents here) operate federally certificated commercial airline flights at the Evansville-Vanderburgh Airport (herein the Airport) and would be charged with collection of the tax on enplaning passengers imposed by Ordinance No. 33 of the Evansville-Vanderburgh Airport Authority District (herein the District); the other plaintiff-respondent, William F.

Wood, is a member of the class of persons who would be subject to the payment of the one dollar charge imposed by Ordinance No. 33. A. 135-137. In lieu of an evidentiary hearing, the parties filed a Stipulation of Facts (A. 42-97) with the trial court, which issued Findings of Fact and Conclusions of Law (A. 134-157) and, in due course, a judgment granting respondents a permanent injunction in this case (A. 189-197). If injunctive relief had not been granted below, the Ordinance would have taken effect on July 1, 1968.

Respondents' two complaints each challenged in separate counts the validity of Ordinance No. 33 on three separate constitutional grounds:

- (1) Ordinance No. 33 imposes a burden on interstate commerce in violation of the Commerce Clause. A. 14, 108-09.
- (2) Ordinance No. 33 interferes with the rights of passengers to travel among the several states. A. 14, 113-14.
- (3) The burden of Ordinance No. 33 falls on an irrationally drawn class of persons, in violation of the Equal Protection Clauses of the Fourteenth Amendment and the Indiana constitution. *Ibid.*

These grounds were kept separate in the briefs of both parties in the trial court, and the trial court entered separate conclusions of law holding Ordinance No. 33 invalid on each ground. A. 154-55, 192-93. But petitioners completely ignored the right-to-travel issue in their briefs to the Indiana Supreme Court and treated only the Commerce Clause and equal-

protection issues. Respondents' brief in that court pointed out (at 13-16, 31-37) that, under Indiana procedural rules, petitioners had thereby abandoned the right-to-travel issue and that this abandonment required affirmance on that independent ground of the decision of the trial court. However, the Indiana Supreme Court's opinion neither addressed itself to the question whether the right-to-travel issue was properly before it, nor did it express any view on the merits of that issue. It also did not consider the equal protection issue, basing its decision solely on Commerce Clause grounds. The decisions of the two courts are discussed at pp. 10-12 *infra*.

B. Description of Ordinance No. 33

Ordinance No. 33 was enacted by the District on February 26, 1968 and would impose a levy of one dollar upon enplaning commercial airline passengers at the Airport beginning on July 1, 1968 but for the injunctive relief granted below. Each commercial airline is charged, together with its various agents and employees, with the responsibility of collecting the charge imposed by the Ordinance. The airlines are authorized to deduct six percent of all amounts so collected for the purpose of defraying their administrative costs in collecting the charge. The Ordinance exempts from the charge members of the U. S. armed forces and passengers whose flight terminates or requires an intermediate or temporary stop at the Airport. It is specifically stated in the Ordinance that the proceeds from the charge shall be allocated to the construction, improvement, equipment and maintenance of the Airport and its facilities for the "use . . . by all users thereof."

**C. Application of "Use and Service Charge" Imposed
by Ordinance No. 33**

The charge imposed by Ordinance No. 33 would apply to passengers of all three of the respondent airlines, which are the only three commercial air carriers now transporting passengers to and from the Airport pursuant to Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board. A. 44. Two of the three respondent carriers, Eastern Airlines and Allegheny Airlines, are engaged exclusively in interstate commerce. The third, Delta Air Lines, is engaged in both intrastate and interstate commerce. *Ibid.* Approximately 88 percent of all enplaning commercial passengers at the Airport are interstate travelers bound for ultimate destinations outside the State of Indiana. A. 49.

Although the levy imposed by Ordinance No. 33 is described therein as a "use and service charge," the trial court reached findings of fact² that the charge bears no reasonable relationship to the actual use or nonuse of facilities at the Airport (A. 151) and that the operating incidence of the charge is solely on the act of enplaning upon a commercial airline at the Airport (A. 148). These findings are based on the parties' stipulation that the facilities of the Airport are available to, and are used by, large numbers of

² As the Supreme Court of Indiana observed, "The facts [in this case] are undisputed." A. 202. This Court generally will not re-examine a state court's findings of fact, *Grayson v. Harris*, 267 U.S. 352, 358 (1925), in the absence of a showing that a federal right has been denied below as the result of a finding unsupported by the evidence, or of a showing that a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. See *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927).

persons other than enplaning commercial airline passengers. A. 47-48.

It is stipulated that departing passengers on the flights of respondent airlines do make use of a number of facilities at the Airport. A. 46-47. However, these facilities are also available to other persons and may include air passenger service counters, waiting rooms, rest rooms, baggage facilities, taxi and car rental facilities, food and beverage facilities, barber shop and parking lots. *See ibid.* There was no evidence in the record to contradict the finding of fact of the trial court (A. 151) that the exaction imposed by Ordinance No. 33 bears no reasonable relationship to the use of these or any other facilities of the Airport by these passengers.

It is obvious also that the respondent airlines themselves make use of a number of facilities at the Airport for the taking off and landing of their aircraft.³ A. 44. Nevertheless, these facilities also are available to other aircraft operators and include runways and taxiways, fuel storage areas, an approach lighting system and an instrument lighting system. A. 46-47. For some time the respondent airlines have been subject to various charges which are related to their use of the Airport, including rentals, landing fees and similar charges pursuant to lease agreements with the District. *See* A. 60, 137-42; Appendix C at pp. 55-57 *infra*. There was no evidence in the record to re-

³ Based on 1967 figures, takeoffs and landings by commercial aircraft of respondent airlines account for only about 15 percent of all flight operations at the Airport. In 1967, there were 12,834 takeoffs and landings by respondent airlines, and 84,598 by other civil and military aircraft. A. 46-48. In the same year, commercial operations at the Airport resulted in 146,955 passenger enplanements and 145,142 passenger deplanements. *Ibid.*

fute the findings of fact (A. 151) by the trial court that the exaction imposed by Ordinance No. 33 bears no reasonable relationship to the use of these or any other facilities of the Airport by respondent carriers. Moreover, the trial court noted that the leases entered into between the District and each of the respondent airlines specifically provide that "[n]o rentals, fees, license, excise or operating taxes, tolls or other charges, except those [provided in the lease], shall be charged against or collected from directly or indirectly, the [airline] for the privileges of . . . transporting, loading, unloading, or handling persons . . . from or on the Airport." A. 142.⁴

The majority of persons using the facilities of the Airport are not subject to the charge imposed by Ordinance No. 33 and include enplaning passengers who are active members of the armed forces (A. 48) or who are temporarily stopping at the Airport after arrival by commercial aircraft en route to other destinations (*ibid.*); deplaning commercial passengers (A. 47); persons arriving or departing on non-scheduled or non-commercial aircraft (*ibid.*); persons sending or receiving air freight shipments (*ibid.*); persons meeting or seeing off commercial and non-commercial passengers (*ibid.*); and persons visiting the Airport to sightsee or to use dining, bar, car rental or other facilities (A. 46-48). This majority of persons not subject to the one dollar service charge uses many of the same facilities used by respondent airlines and their enplaning passengers. *See ibid.*

⁴ In addition to these state and local charges, respondent carriers are also subject to federal user taxes, some of which may be used to finance, through extensive federal grants, a number of developments at the Airport. *See* A. 82, 95-96; 49 U.S.C. § 1742(f).

It has been agreed by the parties, and confirmed by the findings of the trial court, that the only effective and practical method by which the respondent airlines can be assured every person boarding one of their aircraft at the Airport pays the one dollar charge imposed by Ordinance No. 33 is to publish this charge as part of or in addition to their rates for departure from the Airport. A. 50, 147-48. To accomplish this, the respondent carriers would incur costs and expenses in effecting rate changes and providing nationwide accounting and remittance procedures. The costs and expenses of effecting and maintaining these changes and procedures might or might not exceed the six percent collection fee permitted by carriers under the Ordinance. *Ibid.* The result may be to require every airline ticket agent and travel agent in the United States and abroad selling airline flights originating at the Airport to be familiar with the District's service charge procedures. See A. 50, 147-48, 152. Based upon the stipulation of the parties, the trial court found that the necessary accounting and remittance procedures, as well as the necessary notice of the charge to every vendor of respondent airlines' tickets, would impose a heavy burden upon the interstate commerce conducted by the airlines to the detriment of their business and air commerce in the United States. A. 152.

D. Airport Head Tax Cases in Other Jurisdictions

The case at bar is one of four similar cases brought in state courts to enjoin the enforcement of airport head taxes which sprang up across the nation in 1968 and 1969. See *Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, 111 N.H. 5, 273 A.2d 676 (1971), *prob. juris. noted*, Oct. 12, 1971, No. 70-212;

Northwest Airlines, Inc. v. Joint City-County Airport Bd., 154 Mont. 352, 462 P.2d 470 (1970); *Allegheny Airlines, Inc. v. Sills*, 110 N.J. Super. 54, 264 A.2d 268 (1970) (appeal dismissed). In each of these cases the statute purported to impose a one dollar charge for each passenger boarding a commercial aircraft. Also in each case most of the passengers affected were traveling in interstate commerce, were covered by the charge without regard to any actual use of the airport facilities, and constituted a minority of all users of the facilities. The only essential difference in the four statutes is that in Indiana the charge is imposed directly on the passengers, and the carriers are directed to collect it, whereas in Montana, New Jersey, and New Hampshire the charge was, in form, imposed on the carriers which were authorized but not directed to pass it on to the passengers.

In every case, except the one in New Hampshire, the statutes have been held to be repugnant to one or more provisions of the Federal Constitution and declared invalid.⁵ In the *Northwest* case the Montana Supreme

⁵ In addition, at least four legislative proposals for similar head taxes have been abandoned in the face of opinions of state or local officials that they were unconstitutional for one or more of the same reasons. Opinion of Attorney General of North Carolina, CCH N.C. State Tax Rep. ¶ 201-329 (1968); Opinion of the Attorney General of the State of Hawaii, No. 69-7, CCH Hawaii State Tax Rep. ¶ 200-048 (1969); Opinion of the Attorney General of the State of Washington, CCH Wash. State Tax Rep. ¶ 200-304 (1962); Opinion of the City Attorney of the City of Los Angeles, Report No. 12 on Council File No. 108718, Sept. 12, 1962 (unreported). The California Senate on May 12, 1971 passed a bill, SB 211, to authorize the imposition of a head tax on commercial air passengers "for the privilege of using airport facilities to depart" from the airport, but this bill has been amended in the California Assembly to delete any reference to such a tax. See the table of recent airport head tax proposals and legislation in Appendix B at pp. 53-54 *infra*.

Court held that the head tax was repugnant to the right to travel, the Commerce Clause, and the Equal Protection Clause. The reasoning and result of that case were expressly adopted by the New Jersey court in *Allegheny*. As indicated at pp. 3-4 *supra*, the Indiana Supreme Court invalidated the head tax in the present case solely on the basis of the Commerce Clause without reaching the other two issues. In the *Northeast* case the New Hampshire Supreme Court disregarded the opinions of the other three courts, as to the Commerce Clause issue, on the theory that the enplanement of passengers subject to the tax is a wholly *intrastate* event and that, in any event, the tax was a valid user's fee. 273 A.2d at 678. This Court has noted probable jurisdiction to review the decision in *Northeast*. Docket No. 70-212.*

E. Decisions Below

1. *The trial court* held Ordinance No. 33 invalid on all three constitutional grounds specified in respondents' complaints and entered specific conclusions of law holding that (i) the Ordinance, not being related to or apportioned according to the use of facilities at the Airport, constitutes an unreasonable burden on

*The Court accepted jurisdiction in *Northeast* on the same day (October 12, 1971) as in the present case. The briefs for the two cases are to be filed at the same time, and it seems reasonable to believe that they will both be set down for argument on the same day. Since the two cases involve many similar arguments, particularly as to the Commerce Clause, the attorneys for the airlines (who are nearly identical in each case) have attempted to avoid unnecessary repetition of material in this brief that was covered in the Brief for Appellants filed by them in *Northeast*. Even so, there will necessarily be some duplication between the airlines' briefs in the two cases in the interest of clarity and orderly presentation.

interstate commerce (A. 154); (ii) the Ordinance is invalid as an intrusion upon the exclusive power of the Federal Government to regulate those aspects of interstate commerce requiring uniform national regulation (*ibid.*); (iii) the Ordinance violates the right to travel and is invalid under the Privileges and Immunities Clause of the Fourteenth Amendment (A. 154-55); and (iv) the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment.⁷ A. 155.

In holding Ordinance No. 33 invalid as a tax unrelated to the use of facilities at the Airport, the trial court confirmed its findings of fact that the charge "does not otherwise have any valid or reasonable basis for its imposition only upon enplaning passengers upon commercial aircraft" and that the "charge is, in reality, a condition of departure from Dress Memorial Airport into interstate commerce." A. 151. This holding further affirmed the court's finding that the collection of a charge like the one imposed by the Ordinance "would impose a heavy burden upon the interstate air commerce conducted by plaintiff airlines to the detriment of their business, with resulting adverse affect [*sic*] upon the air commerce in the United States." A. 152-53.

2. *The Indiana Supreme Court*, as noted at pp. 3-4 *supra*; based its decision entirely on Commerce Clause grounds. The court viewed the issue on appeal to be whether the act of enplanement on commercial aircraft is reasonably related to the use of the facilities at the Airport for which the one dollar charge is

⁷ The trial court also held the imposition of the one dollar charge to be unconstitutional under Article I, Section 23 of the Indiana constitution. A. 154-55. The state Supreme Court did not deal with the validity of the charge under the Indiana constitution.

levied. A. 202. In considering this issue, the court relied heavily upon decisions of this Court stating the rule that the classification used for the assessment of such fees "must embody a uniform, fair, practical standard bearing a reasonable relationship to the use of state facilities." A. 202, citing *Hendrick v. Maryland*, 235 U.S. 610 (1915). On the basis of these decisions, the court held that the tax imposed by Ordinance No. 33 "is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause]." A. 207.

There was no specific discussion in the Supreme Court opinion of the trial court's conclusion (A. 154) that the Ordinance is invalid as an intrusion by the District upon the exclusive power of the Federal Government to regulate an aspect of interstate commerce requiring national uniformity; the holding of the Supreme Court implicitly affirmed this conclusion, however, since the test for reasonable relation to use, viewed by that court as the only issue on appeal, bears primarily on whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate interstate commerce. See *National Bellas Hess v. Department of Revenue*, 386 U.S. 753, 756 (1957), cited by the Supreme Court at A. 202.

SUMMARY OF ARGUMENT

I.

It is evident that the levy imposed by Ordinance No. 33, despite its designation as "user and service charge," is to be judged for constitutional purposes as a tax levied for the act of enplanement, and thus in effect upon the act of departure from the locality.

See A. 151. This characterization of the charge was confirmed by both the trial court and the Indiana Supreme Court. The petitioners themselves have conceded that the incidence of the charge imposed by Ordinance No. 33 is on the act of enplanement of passengers on aircraft of respondent carriers. Brief for Petitioners at 41. The wording of the Ordinance leaves no doubt that this is correct, since it specifically charges respondent airlines "with the responsibility of collecting" the charge from enplaning passengers. No tax is payable by any passenger, regardless of his purchase of a ticket for departure, or his use of Airport facilities, unless he actually enplanes at the Airport. A. 148.

There is no question, moreover, "that the incidence of the tax imposed by Ordinance No. 33 falls on interstate commerce," since the overwhelming majority of persons departing from the Airport on respondent airlines enplane for ultimate destinations beyond the state. A. 201-02; see A. 144. See *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (loading of ships is "essentially a part of the commerce itself").

It is well established that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of interstate commerce that it cannot realistically be separated from it. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166 (1954). As recognized below, taxes or fees of any amount whose incidence falls on an integral aspect of interstate commerce are invalid because there are no standards by which the reasonableness of the tax can be measured. This Court struck down a Nevada head tax remarkably similar to the one imposed by Ordinance No. 33

in the leading case of *Crandall v. Nevada*, 6 Wall. 35 (1868). The Court emphasized in *Crandall* that the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling, cumulative burdens on interstate travel.

II.

As a tax on interstate commerce, the charge imposed by Ordinance No. 33 represents a violation of the Commerce Clause that cannot be justified as a valid user charge. This was recognized by the Indiana Supreme Court holding "that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause]." A. 207.

Ordinance No. 33 and the Stipulation of Facts, as well as the Findings of Fact of the trial court, plainly show that the charge is levied arbitrarily and capriciously without any reference to actual use of Airport facilities by scheduled carriers or their enplaning passengers. The Ordinance exempts the majority of persons using the Airport (deplaning passengers, private aviators, visitors and others), even though the use of the Airport facilities by this majority of exempted persons is no different from the use of such facilities by enplaning commercial airline passengers who are subject to the charge (A. 151).

The tax imposed by Ordinance No. 33 is not justified by the cases permitting highway user charges on motor carriers, or where license fees are imposed in the exercise of state police powers to regulate highway use, as in *Sprout v. City of South Bend*, 277 U.S. 163 (1928), since the Ordinance makes no attempt to

relate the amount of the exaction to the amount of actual use. The charge imposed by the Ordinance may be further differentiated from state highway user fees in that it is measured by and collected from occasional travelers using commercial carriers. There is a great difference between state user taxes on commercial carriers and a checkerboard of airport head taxes which could be imposed on millions of individual airline passengers in varying amounts and under diverse conditions by more than 500 state and local authorities. See Brief for National League of Cities as Amicus Curiae at 2. These head taxes would have to be calculated not only by the carriers and their passengers, but also by every vendor of airline tickets in the United States. See A. 152-53.

It is not enough for the District to argue, as it does in this case, that the Airport's facilities are essential for the safety, comfort and convenience of commercial airlines and their passengers and that the District needs the money to pay for them.⁸ The mere disclosure of a deficiency in the District's budget cannot take the place of the showing required by this Court that the charge bear a reasonable relationship to actual use by enplaning passengers. Indeed there appears to be no instance in which this Court has ever sustained an attempt of a state to impose a charge measured by passengers of a commercial carrier without a showing that the charge is reasonably related to the use of state facilities by the passenger. See *Interstate Transit Inc. v. Lindsey*, 283 U.S. 183 (1931); see also *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 561 (1950) (appendix to dissenting opinion of Frankfurter, J.).

⁸ See Brief for Petitioners at 21.

Ordinance No. 33, furthermore, cannot be sustained under the state's police or taxing powers, since there is no possible contention that the Ordinance qualifies as a measure to protect the life, labor, health or property of its citizens, or its power to exact fair compensation for facilities and services provided by it. *See Ness Produce Co. v. Short*, 263 F. Supp. 586, 588 (D. Ore. 1966), *aff'd per curiam*, 385 U.S. 537 (1967).

Ordinance No. 33 is also invalid as a tax levied discriminatorily against interstate commerce. The operating incidence of the Ordinance falls almost exclusively on a single class of persons, almost all of whom are traveling in interstate commerce. It is clear from the record that exempted groups using the Airport include a substantial number of persons whose activities have no interstate ramifications and who are not required to pay the fee imposed by the Ordinance or any similar exaction.

III.

Even if the exaction imposed by Ordinance No. 33 were not struck down on other grounds, the tax would still be invalid as an intrusion of the state into an aspect of interstate commerce requiring national uniformity and therefore lying within the exclusive jurisdiction of Congress. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). The need for uniformity is confirmed by the obvious dangers which the uncontrolled multiplication of state charges of the type at issue would present to the free flow of interstate commerce. Since the power to impose a charge on enplanement cannot logically be distinguished from the power to impose such an exaction on deplanement, arrival and departure taxes of different amounts could be levied at each point of intermediate stopover or

transfer on a passenger's route, and the total effect on the cost of air transportation could be prohibitive.

It is apparent that this everchanging hodgepodge of charges might seriously affect the fare structures set by the Civil Aeronautics Board, and would certainly burden the airlines with a heavy, if not impossible, responsibility for the collection of the charges. See A. 50-51, 152. This is not an imaginary threat, but is evident from the proliferation of state and municipal proposals to impose airline head taxes over the past ten years as outlined in Appendix B at pp. 53-54 *infra*, and from the estimate that such taxes could be imposed on scheduled air carriers by some 500 local authorities. See Brief for National League of Cities as Amicus Curiae at 2.

IV.

It would appear reasonable for this Court to apply the same standards for protection of the individual's right of interstate travel under the Commerce Clause as are now applied for protection of this right under other provisions of the Federal Constitution, since the Commerce Clause has traditionally been closely associated with the right to travel. See, e.g., *Minnesota Rate Cases*, 230 U.S. 352, 400 (1913), citing *Candall v. Nevada*, *supra*. As an infringement of the right of interstate travel, Ordinance No. 33 fails to meet the tests of compelling state interest and demonstrated lack of alternatives required by this Court in the two leading right-to-travel cases of *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The burden of proving the exaction's validity, under *Sherbert*, is upon the District, which in the present case has been unable to show any such justification for the tax.

ARGUMENT

ORDINANCE NO. 33 IS REPUGNANT TO THE COMMERCE CLAUSE SINCE IT IS AN INTRUSION BY THE STATE INTO AN ASPECT OF INTERSTATE COMMERCE REQUIRING NATIONAL UNIFORMITY AND THE TAX IMPOSED THEREUNDER PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE WHICH CANNOT BE JUSTIFIED AS A VALID USER CHARGE OR EXERCISE OF STATE POLICE POWER OR BY A COMPELLING GOVERNMENTAL INTEREST

Both of The Questions Presented as stated in the Brief of Petitioners (at 2) relate to whether the District has the right under the Commerce Clause to impose user charges or service fees on persons using facilities furnished by the District. These questions have been consolidated in this brief (p. 2 *supra*); since neither the courts below nor the respondents have contended that the District does not have the right to impose proper user charges. The issue in this case is whether the *particular provisions of Ordinance No. 33* establish a valid user charge or whether, as the courts below unanimously held, those provisions fail to conform to all of the Commerce Clause standards for a valid user charge as enunciated in the decisions of this Court.

A. The Operating Incidence of Ordinance No. 33 Is Upon the Passenger and the Act of Departure

There is no dispute that the incidence of the charge imposed by Ordinance No. 33 is upon the act of enplanement of passengers upon respondent carriers' aircraft. The Ordinance specifically states that the tax must be paid "for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport." Moreover, the Ordinance specifically charges respondent airlines "with the responsibility of collect-

ing" the charge from enplaning passengers.⁹ No tax is payable by any passenger, regardless of his purchase of a ticket for departure, or his use of airport facilities, unless such passenger actually enplanes at the Airport. A. 148. No tax is payable by a carrier unless and until a passenger enplanes on its aircraft regardless of the use of airport facilities by the carrier or the passenger, and even then the amount payable depends on the number of passengers enplaning rather than on use by the carrier. Both the trial court and the Indiana Supreme Court confirmed this characterization of the charge, the latter specifically holding that "the tax is on the act of enplanement." A. 202.

The petitioners have agreed in this Court that the incidence of the charge is on the act of enplanement, repeatedly emphasizing that the Ordinance "does not place [imposition of the charge] upon the airlines, but their enplaning passengers."¹⁰ Based upon this circumstance, it is clear that the levy imposed by Ordinance No. 33, notwithstanding its designation as a "user and service charge" imposed on the passenger, is to be judged for constitutional purposes as an exac-

⁹ As observed at p. 9 *supra*, the requirement of Ordinance No. 33 that the charge be collected directly from the passenger is the major difference between the tax in this case and the one involved in *Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, *supra*. In the *Northeast* case, the statute imposed the charge on the carriers which were authorized to pass it on to the passengers. N.H. REV. STAT. ANN. § 422:43.

¹⁰ Brief for Petitioners at 41. The Indiana Supreme Court recognized, in any event, that a fee or tax imposed on the carrier but measured by the number of passengers is no different from a direct exaction upon the passengers themselves, and thus whether the form of the tax is one imposed on the carrier or the passengers is of no legal significance. See A. 207, citing *Henderson v. Mayor of New York*, 92 U.S. 259 (1876).

tion levied for the act of enplanement, and thus in effect upon the act of departure from the locality.¹¹ See A. 151.

B. The Tax Falls on an Integral Aspect of Interstate Travel and Therefore Is Invalid

1. The Incidence of the Tax Falls on Interstate Commerce

The Indiana Supreme Court held "[t]here is no question that the incidence of the tax imposed by Ordinance No. 33 falls on interstate commerce," since over 88 percent of the persons who depart from the Airport on respondent airlines enplane for ultimate destinations beyond the state. A. 201-02; see A. 144. Although the petitioners express some uneasiness with this holding,¹² they do not seriously contend that it is unjustified; indeed petitioners have based almost their entire argument on the assumption that enplaning passengers are in interstate commerce.¹³

As a tax on interstate commerce, the charge imposed by Ordinance No. 33 is invalid since—

"[i]t is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate commerce, the

¹¹ It cannot be doubted that passengers enplaning commercial aircraft intend by so doing to initiate transportation from the point of enplanement to some other place. The very definition of "enplane" is "to board an airplane for purposes of travel." *Webster's Third New International Dictionary* 755 (1961). To tax the act of enplanement, therefore, is in effect to tax the act of departure; the act of enplanement has no independent significance.

¹² See Brief for Petitioners at 22.

¹³ See, e.g., *id.* at 8-11.

flow of commerce, that it cannot be realistically separated from it." *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166 (1954).

Accord, Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 368 (1954).

In *Michigan-Wisconsin* this Court held invalid a Texas statute taxing the occupation of "gathering gas" as applied to an interstate natural gas pipeline company where the incident of taxation was the taking of gas from the outlet of an independent gas plant for the purpose of immediate interstate transmission. It held that the receipt of the gas into the pipeline from a practical point of view was its "taking off" in the carrier's pipeline into commerce. "[I]n reality the tax is, therefore, on the exit of the gas from the State." 347 U.S. at 167. The situation is the same with respect to the case at bar. The enplanement of departing commercial air passengers at New Hampshire airports "cannot realistically be separated" from taxiing to the runway, takeoff, and landing in another state. Therefore, a tax on the act of enplaning is in reality a tax on departure from the state and is invalid under the Commerce Clause.

Similarly, in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433 (1947), this Court held invalid the application of an apportioned state gross receipts tax to stevedoring on the ground that loading of vessels is "essentially a part of the commerce itself." The holding was based on the premise that "transportation by water is impossible without loading and unloading" and that "the movement of cargo off and on the ship is substantially a continuation of the transportation." 330 U.S. at 426, citing Justice Cardozo's opinion in *Puget Sound Stevedoring*

Co. v. State Tax Commission, 302 U.S. 90, 92 (1937). It is apparent that enplanement of passengers also is "essentially a part of the commerce itself" since transportation by air is impossible without loading and unloading the aircraft. This conclusion is confirmed by the general rule stated in *Carter & Weekes* that—

"[t]he transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-28.

It is thus evident that enplanement is just as much an aspect of interstate commerce as taxiing to the runway or takeoff.¹⁴ Certainly there is a much closer relation-

¹⁴ See note 11 at p. 20 *supra*. The petitioners therefore have little basis for relying on this Court's decisions upholding state sales and use taxes for the proposition that the incidence of the charge is based on the use of airport facilities before enplaning passengers have entered interstate commerce. See Brief for Petitioners at 22. These taxes have been sustained because they are "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940). Sales and use taxes have long been "properly differentiated from a direct imposition on interstate commerce," *Freeman v. Hewit*, 329 U.S. 249, 257 (1946), and petitioners have no argument that Ordinance No. 33 should be considered as falling into the "consumption tax" category. See Brief for Petitioners at 22.

Similarly, petitioners have no justification for drawing an analogy between Ordinance No. 33 and cases upholding state taxes on local manufacture, *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932), or taxes on the franchise to conduct a business in the state, *Maine v. Grand Trunk Ry.*, 142 U.S. 217 (1891) (5-4 decision), or nondiscriminatory state gross receipts taxes on local activities, *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944). See also *Western Union Tel. Co. v. Kansas ex. rel. Coleman*, 216 U.S. 1 (1910) (implicitly questioning *Grand Trunk*).

ship between enplanement and interstate travel than there is between enplanement and use of airport facilities, which latter relationship petitioners suggest should justify Ordinance No. 33 as a user fee.¹⁵

2. The Tax Is Invalid Because There Are No Standards by Which Its Reasonableness Can Be Measured

It is well established that taxes or fees of any amount whose incidence falls on an integral aspect of interstate commerce are invalid because there are no standards by which the reasonableness of the tax can be measured. Therefore, sustaining the power to tax at all would imply that a state could tax at will and completely interdict the activity.

"The same power that may impose a tax of two cents per ton on coal carried out of the State, may impose one of five dollars. Such an imposition whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial inter-

¹⁵ The recognition that enplanement is an aspect of interstate commerce by the Indiana Supreme Court is an essential difference between the reasoning of its decision and that of the New Hampshire Supreme Court in *Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, p. 8 *supra*. Although the New Hampshire court conceded that the incidence of the charge depends upon the enplanement of passengers, the court went on to characterize enplanement as "an event which is wholly intrastate." 273 A.2d at 678 (emphasis added).

course between States remote from each other may be destroyed." *Case of the State Freight Tax*, 15 Wall. 232, 276, 280 (1873).

In considering the question of validity of a local tax on interstate passengers, the lodestar has long been *Crandall v. Nevada*, 6 Wall. 35 (1868) in which this Court struck down a Nevada head tax strikingly similar to that imposed by Ordinance No. 33.¹⁶ There the State of Nevada sought to levy a tax of one dollar upon every person leaving the state by railroad, stagecoach or other vehicle engaged in transporting passengers for hire. In holding the Nevada statute to be unconstitutional, the majority of the Court in *Crandall* declined to rely upon the Commerce Clause on the ground that Congress had not yet passed any laws which would be inconsistent with the tax imposed by the state. See 6 Wall. at 43. Instead, the majority rested its holding upon the requirements of the federal system itself, from which the Court derived a right to travel from state to state without interruption. See 6 Wall. at 48-49, citing *Passenger Cases*, 7 How. 283 (1849). However, two of the justices in *Crandall* concurred solely on the basis of the Commerce Clause, taking the position that the Nevada statute was inconsistent with the power conferred upon Congress to regulate interstate commerce. 6 Wall. at 49. The justification for deciding a case like *Crandall* on the basis of the Commerce Clause, as well as on protection of the right to travel, is even stronger today than a century ago, since interstate air transportation of passengers is now a

¹⁶ *Crandall* is discussed in more detail in the context of the right-to-travel issue in the Brief for Appellants at 27-29 in *North-eastern Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, Docket No. 70-212, the New Hampshire head tax case now before this Court.

highly regulated activity as to which there has been a clear expression of congressional intent. See discussion at pp. 39-41 *infra*.¹⁷

The flaw discovered by the Court in the Nevada statute was not the amount of the tax, but the very assertion of the right to levy an exaction of that character, which bears as directly on the validity of the tax under the Commerce Clause as on the right-to-travel issue.

"[I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other." 6 Wall. at 46.

The apprehended evils underlying the Court's decision in *Crandall* are clearly present in Ordinance No. 33. If the states are empowered to tax the act of departure, no inherent limits exist as to the cumulative amounts of such charges. Clearly the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling cumulative burdens

¹⁷ The reference in the Brief for Petitioners at 30-31 to *Minnesota Rate Cases*, 230 U.S. 353, 402 (1912) is misplaced; since the paragraph cited by the District is prefaced by a series of "limitations," including the specific condition that—

"the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, . . . or upon persons or property in transit in interstate commerce. *Passenger Cases; Crandall v. Nevada; State Freight Tax Case*." 230 U.S. at 401 (full citations omitted and emphasis added).

on interstate travel, and this is so whether the charge, based on passenger enplanements, is paid by the airlines or by the passengers. *Crandall v. Nevada*, 6 Wall. 35, 46 (1868); *Case of the State Freight Tax*, 15 Wall. 232, 276 (1873). The right of the airport of departure to tax the act of enplanement cannot logically be distinguished from the right of the airport of arrival to tax the act of deplanement. By the same token, arrival and departure taxes could be levied by airports at each point of intermediate stopover or transfer on a passenger's route. Since no rational basis exists for apportioning the right to tax arrival and departure among the various airports through which a traveler might pass, there is nothing to prevent the accumulation of crippling burdens on interstate air travel.¹⁸ See Appendix B at pp. 53-54 *infra*.

C. The Exaction Imposed by Ordinance No. 33 Cannot Be Justified as a Valid User Charge

The Supreme Court of Indiana, after a thorough review of the facts in this case, held that "it is clear . . . the tax imposed by Ordinance No. 33 is not rea-

¹⁸ To take a single example, a one dollar enplanement fee at Evansville, Indiana, and a one dollar deplaning fee at Louisville, Kentucky would increase the cost of air travel (the present coach fare is \$18) between these two points by more than 11 percent. The increase would be even greater were either airport to charge a higher fee. In either case the impact on the competitive position of air transportation between these points would clearly be substantial. This danger was recognized in *Joseph v. Carter & Weekes Co.*, 330 U.S. 432, 429 (1947), discussed at pp. 21-23 *supra*, in which this Court observed that, at least in part, "the multiple burden on interstate transportation from taxation of . . . [loading] arises from the possibility of a similar tax for unloading." See also *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170 (1954) (invalidating tax on "taking" of gas into pipeline since upholding such an exaction would permit tax on arrival in another state).

sonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause]." A. 207. This holding was entirely in accord with the conclusions of law and findings of fact of the trial court on the Commerce Clause issue.

1. A State Exaction on Interstate Commerce Must Bear a Reasonable Relation to Use of State Facilities

The basic principle relied upon by the Indiana Supreme Court, reaffirmed by this Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967), is that state taxation falling on interstate commerce "can only be justified as designed to make such commerce bear the fair share of the cost of the local government whose protection it enjoys."¹⁹ The court recognized that the mere fact the taxing authority denominates the tax as a "use and service charge" does not settle the question whether the tax in fact is reasonably related to use of its facilities. *Ibid.* Relying upon this Court's decision in *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915), the court observed that fees collected for the use of state facilities must be levied according to a "uniform, fair, and practical standard." A. 202. As the court said, moreover, the formula or classification used by the taxing authorities for the assessment of such taxes must bear a reasonable relation to the use of its facilities, *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176

¹⁹ See *Freeman v. Hewit*, 329 U.S. 249 (1946). See also *Bode v. Barrett*, 344 U.S. 583 (1953); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

(1940), in order to assure that interstate commerce bears only the burden of fair compensation for intra-state activities incidental to it.²⁰ See *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931); *Sprout v. City of South Bend*, 277 U.S. 163 (1928).

The District concedes that state taxation of interstate commerce is limited to an amount corresponding to a "just share of the state tax burden" by those engaged in interstate commerce. Brief for Petitioners at 23. The tonnage cases relied upon by petitioners, even though based on the Tonnage Duty Clause of the Constitution²¹ rather than on the Commerce Clause, are generally consistent with the principle developed under the Commerce Clause that a state exaction on interstate commerce must bear a reasonable relationship to the use of its facilities. In *Huse v. Glover*, 119 U.S. 543, 548 (1886), cited by petitioners, this Court made clear that the exaction of tolls for passage through locks or for wharfage will be upheld only where it is shown to be "compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream." The tolls in *Glover* were imposed upon *all* users of state-improved locks according to the tonnage of the vessels and the amount of freight carried by them, and the Court concluded that such tolls constituted a reasonable user charge rather than a tonnage duty which is specifically prohibited by the Constitution. *Accord, Packet Co. v. Keokuk*, 95 U.S. 80 (1877) (case discussed in *Glover*

²⁰ See also *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, 154 Mont. 352, 463 P.2d 470 (1970).

²¹ ART. I, § 10, cl. 3, which prohibits the imposing of a tonnage duty by any state without the consent of Congress.

upholding charge proportioned on tonnage for use of wharfage facilities).²²

2. Ordinance No. 33 Bears No Relation to Use of Airport Facilities

Measured against these constitutional standards, Ordinance No. 33 cannot be justified as a user fee, and the Indiana courts were correct in reaching this conclusion. The Ordinance and the Stipulation of Facts, as well as the trial court's findings of fact, clearly show that the charge is levied arbitrarily and capriciously without any reference to actual use of Airport facilities by scheduled air carriers or their enplaning passengers. The respondents concede that interstate commerce should be expected to "pay its own way," but they reject the notion of any tax such as that imposed by the Ordinance which is not reasonably related to use of Airport facilities in accordance with long-established constitutional principles.

First, the charge imposed by Ordinance No. 33 on the number of enplaning passengers bears no reasonable relationship to their actual use or nonuse of the

²² Although the question was not specifically discussed by the Court in these early cases, it was evident even then that the tonnage of vessels and the amount of their freight probably were thought to bear a reasonable relationship to the use of locks and wharfage facilities, since it is plain that larger and heavier vessels draw more water, occupy greater space, and require more elaborate facilities (such as larger locks and more secure berths).

It is interesting that the measure for the landing fees charged respondent airlines by the District bears some similarity to the tonnage measure approved in *Glover* and related cases, in that such landing fees are graduated according to the cumulative weight of the aircraft. See Appendix C at pp. 55-57 *infra*.

facilities at the Airport. The trial court found that the majority of persons using the Airport (deplaning passengers, private aviators, visitors and others) are exempted from the payment of the one dollar service charge and that the use of the Airport facilities by this majority of exempted persons is no different from the use of such facilities by enplaning commercial airline passengers who are subject to the charge. A. 151. Indeed, all persons (including enplaning airline passengers) who use facilities at the Airport already pay some type of direct or indirect user charge for the facilities actually used by them. A. 151-52. The trial court found that enplaning passengers do not make use of *any* significant facilities or services at the Airport which are not also used by a numerically larger group of other persons who are not subject to payment of the one dollar charge imposed by the Ordinance. A. 152.

Second, even if Ordinance No. 33 could be considered to impose a user charge on the carrier rather than on the passenger (a proposition which, as noted above, is contrary to the terms of the Ordinance and to basic constitutional principles), the imposition of a charge based on the number of enplaning passengers bears no reasonable relationship to use of Airport facilities by the carrier. Each flight operation (takeoff or landing) by commercial air carriers makes certain use of runways, taxiways, landing aids and other similar facilities, regardless of the number of passengers aboard the plane, for which the respondent carriers compensate the District by payment of landing fees and other charges. Similarly, the carriers occupy specified portions of the Airport terminal, and pay

rent therefor in accordance with lease agreements, regardless of the number of enplaning passengers.²³ A. 137-42; see Appendix C at pp. 55-57 *infra*. Even the leases entered into between the District and the respondent carriers specifically contemplate that the charges paid thereunder will fully compensate the District for the actual use of Airport facilities by the carriers and their passengers. These agreements state that "[n]o rentals, fees, license, excise or operating taxes, tolls or other charges" except those provided in the leases, shall be charged against or collected from the carriers directly or indirectly for the privilege of the use of Airport facilities. A. 142.

These arbitrary and discriminatory features of the exaction illustrate that the fee imposed by Ordinance No. 33 has none of the characteristics of a charge imposed on use of airport facilities. It is apparent from decisions of this Court that to vary the charge payable by the carrier or its passengers for the use of runways, taxiways, landing aids and other similar facilities by the number of passengers carried is in effect to base the fee on the assumed earning capacity of the flight, and thus impermissibly, on the privilege of doing an interstate business. See *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 187 (1931) (invalidating a state privilege tax on an interstate bus line based on carrying capacity of the buses).

Although petitioners argue that the charge is no different from state highway user taxes, the Ordinance differs significantly from such fees, which are measured on a basis bearing a relationship to the amount of

²³ In addition to these local charges, respondent carriers are subject to federal user taxes, some of which are used to finance facilities at the Airport. See note 4 at p. 7 *supra*.

the carriers' use of the highways, and which are designed to insure payment by all users. Where these characteristics are absent fees on interstate carriers have been held invalid.²⁴ That is exactly the situation in the present case, where the statute, by exempting all Airport users other than enplaning passengers, manifests no purpose to exact fair compensation from all who use Airport facilities. It is not sufficient for the District to maintain, as it does in this case, that the Airport facilities are primarily designed for the safety, comfort and convenience of commercial airlines and their passengers and that the District needs the money to pay for them.²⁵ The mere cataloguing of a deficit

²⁴ In *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940), for example, this Court held invalid an Arkansas tax imposed on the amount of gasoline in excess of twenty gallons carried by a motor vehicle entering the state. The Court reasoned that such a factor could have no reasonable relation to a fair charge for the use of the highways, since large use without compensation was possible by the very terms of the statute. The facts showed that most vehicles could traverse the state using no more than twenty gallons of gasoline. The excess carried could, therefore, have no relation to highway use.

²⁵ See Brief for Petitioners at 21. Petitioners have plainly misread the Montana Supreme Court's opinion in *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, 154 Mont. 352, 463 P.2d 470 (1970) in attempting to distinguish the case on the premise that the court found no need for revenues to maintain and operate the Helena Airport. See Brief for Petitioners at 26-27. It is true that the court said "[t]here is no issue before the court as to the need for revenue," 463 P.2d at 475. (emphasis added), but the context makes clear that the court meant there was no doubt as to the airport's revenue needs. The court specifically stated:

"There is a need for revenue to support the Airport

However, even if legislation such as [that imposing the airport service charge] seeks to achieve good and necessary ends, it must do so in a fashion not impinging on constitutional rights." *Ibid.* (emphasis added).

in the District's budget will not serve as a substitute for a showing that the charge bears a reasonable relationship to actual use by enplaning passengers, particularly where the Ordinance itself demonstrates an intent to utilize the proceeds of the tax for the benefit of "all users" of the Airport.

Admittedly, in the case of highway use charges imposed on motor carriers, the courts have permitted a certain degree of approximation in the method of apportionment and, where license fees are imposed in the exercise of the states' police powers to regulate highway use, have permitted impositions of flat fees designed to defray the expenses of such regulation. *Sprout v. City of South Bend*, 277 U.S. 163 (1928). The power of the states to impose special fees on motor carriers for the privilege of using the highways has been attributed, in great part, to (a) the unusual destruction of the highways occasioned by heavy motor vehicles, *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947), and (b) the fact that "common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use," *Clark v. Poor*, 274 U.S. 554, 557 (1927). These decisions do not justify the tax imposed by Ordinance No. 33, which makes no attempt to establish a reasonable relationship between the amount of the exaction and the amount of actual use of Airport facilities. A. 151.

The charge imposed by Ordinance No. 33 further differs from state highway user taxes in that it is measured by and collected from occasional travellers using commercial carriers. It is conceded that some 35 other states referred to by petitioners may now be permitted

to collect highway user taxes under a variety of classifications and formulas, even though as a result one commercial carrier may have to compute such taxes in 35 different ways. *See* Brief for Petitioners at 38-39. However, these exactions are vastly different from the diverse head taxes which could be imposed on millions of individual airline passengers in varying amounts by hundreds of state and local authorities. *See* Brief for National League of Cities as Amicus Curiae at 2. These head taxes, each with its own peculiarities of incidence, would have to be computed not only by the carriers and their passengers, but also by every vendor of airline tickets in the United States. *See* A. 152-53.

In any case, the latitude permitted the states in devising means of assuring that interstate commerce pay its own way traditionally has not been as great where the question involved is the interstate movement of persons rather than of goods. As this Court has long maintained, the right of a state to charge an interstate motor carrier for the use of its highways, where such a carrier makes continuous use of the highways and where the state's entire highway system is open to such use, does not imply that the state has similar power in regard to the occasional traveller.²⁶ The state's power to levy such charges has been particularly limited in the case of the occasional traveller using a commercial carrier rather than a vehicle under his own control. Indeed there appears to be no decision in which this

²⁶ "[W]e do not mean to imply that the constitutional rule relating a state's power to collect for the use of its roads by occasional travellers is as broad as where roads used by common carriers are involved." *Capitol Greyhound Lines v. Brice*, 339 U.S. at 545 n.5, citing *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495, 503 (1950) and the opinions in *Edwards v. California*, 314 U.S. 160 (1941).

Court has sustained an attempt of a state to impose a charge measured by passengers of a commercial carrier without a showing that the charge is reasonably related to use of state facilities by the passengers. *See Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931); *see also Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 561 (1950) (appendix to dissenting opinion of Frankfurter, J.).

D. Ordinance No. 33 Is Invalid as an Intrusion by the State Into an Aspect of Interstate Commerce Requiring National Uniformity and Therefore Within the Exclusive Jurisdiction of Congress

Even if the exaction imposed by Ordinance No. 33 were held to be a proper user charge, the tax would still be invalid as an invasion of the exclusive authority of Congress to regulate interstate commerce. It is a basic principle of constitutional law that the states are without power "to regulate those phases of the national commerce which, because of the need of national uniformity demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945); *see Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520 (1959); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885); *Welton v. Missouri*, 91 U.S. 275 (1876); *Cooley v. Board of Port Wardens*, 12 How. 299 (1851). Even where Congress has not exercised its undoubted right to preempt the field by enacting legislation, the states are barred from regulating those subjects affecting interstate commerce which require uniform national regulation.

The holding of the Supreme Court of Indiana implicitly relied upon this basic principle, in that the main purpose of the relation-to-use test applied by the

court is to determine whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate interstate commerce. See *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967), cited by the court at A. 206.

1. Interstate Passenger Traffic Requires Uniform National Regulation

It has repeatedly been held that interstate passenger traffic is a subject demanding uniform national regulation. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888); *Case of the State Freight Tax*, 15 Wall. 232 (1873); *Crandall v. Nevada*, 6 Wall. 35 (1868). The need for uniformity is demonstrated by the manifest dangers which the uncontrolled multiplication of state legislation of the type at issue would present to the free flow of interstate commerce. It must be emphasized that the source of constitutional concern does not lie so much with the magnitude or immediate impact of the challenged enactment itself, but rather with the propensity of such enactments as a class to conflict with national policies. Here, as in *Crandall*, the challenged exaction is relatively small in amount, but if such an exaction be upheld there exists the possibility of crippling effects on interstate passenger traffic from the multiplication of such charges and from the imposition of taxes of larger amounts. The power to impose a one dollar exaction on enplanement cannot be logically distinguished from the power to impose such a tax on deplanement, or even a tax of five or ten dollars, each one of which standing alone might well be considered reasonable.

By the same token, arrival and departure taxes could be levied at each point of intermediate stopover or transfer on a passenger's route. If Indiana may tax

enplanement, Illinois may tax deplanement, and California may tax a plane change. If each may charge one dollar, then each may charge any amount. See Appendix B at pp. 53-54 *infra*. If such levies were imposed by each airport along a traveller's route, the total effect on the cost of air transportation could be prohibitive, the competitive structure of air carriers could be affected, and air transportation, compared to other forms of transportation, could be seriously impaired.

The result would be an everchanging hodgepodge of charges that might significantly alter effective fare structures approved by the Civil Aeronautics Board and would certainly impose on the airlines a heavy, if not impossible, burden of collecting the charges. See A. 50-51, 152-53.²⁷ This threat is not an ephemeral one, but is clearly evident from the numerous state and municipal proposals to impose airline head taxes over the past ten years as outlined in Appendix B at pp. 53-54 *infra*; see Brief for National League of Cities as Amicus Curiae at 2. Moreover, if head taxes are

²⁷ For example, Ordinance No. 33 exempts from the charge members of the U.S. armed forces and passengers whose flights terminate or require intermediate or temporary stops at the Airport (A. 39), while the statute imposing an airport head tax in New Hampshire contains no such exemption for passengers enplaning at airports in that state (N.H. REV. STAT. ANN. § 422:43). This kind of inconsistency in the head taxes would make their collection by the airlines even more difficult and would further add to the inequities inherent in such exactions. See Comment, *Airport "Service Charges" and the Constitutional Barriers to State Taxation of Airport Users*, 43 Colo. L. Rev. 79, 102-03 (1971). The result might be to compel every airline ticket agent and travel agent in the United States and abroad selling airline transportation for this country to be familiar with the intricacies of the head tax procedures in each state or city imposing such a tax in order to issue tickets with the correct fare. See A. 51, 152-53.

upheld on airline passengers, the way would obviously be open for the imposition of similar taxes on interstate travel by means of railroads, buses, ferries and other forms of public transportation.²⁸

Where state statutes have threatened multiple burdens on interstate commerce, this Court has uniformly found them to be repugnant to the Commerce Clause. *E.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888); *Case of the State Freight Tax*, 15 Wall. 232 (1873).

With the sole exception of the New Hampshire Supreme Court in the *Northeast* case, *supra*, state courts have in the last two years consistently struck down as unconstitutional various airport head taxes similar to the one imposed by Ordinance No. 33. See the discussion of these cases at pp. 8-10 *supra*. In addition, at least four legislative proposals for similar head taxes have been abandoned in the face of opinions of state or local officials that they were unconstitutional. See note 5 at p. 9 *supra*, and Appendix B at pp. 53-54 *infra*.²⁹

²⁸ One hardly need look back to the castles on the Rhine and the Loire and the hazardous overland routes to the Far East in order to measure the power of the tolltaker on interstate transportation. See Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 228. (1957).

²⁹ The District is on precarious ground in relying (Brief for Petitioners at 39) on Justice Cardozo's statement in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937) to the effect that it will be time enough to mark the limits to a state's power to frame a system of taxation when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. The Court based its holding in *Henneford* on the fact that the taxing statute by its framework specifically avoided the danger of multiple

2. Ordinance No. 33 Conflicts With Federal Policies Demanding Uniform National Regulation of Air Transportation

The degree to which the imposition of such uncoordinated charges by each state and locality throughout the United States interferes with the need for uniform national regulation is even clearer in the present case than in *Crandall*. For, while at the time of *Crandall* there was no national regulation of interstate stage-coach traffic, interstate air transportation of passengers is a highly regulated activity as to which there has been a clear expression of congressional intent that air transportation and policies pertaining thereto be governed by the national-interest. The Federal Aviation Act of 1958, 49 U.S.C. § 1302; charges the Civil Aeronautics Board with the responsibility of regulating air carriers so as to foster "the encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States," "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges" and "the

taxation through the use of an offsetting allowance for taxes imposed by other states. In the present case, however, it is apparent that numerous state and city authorities are fully prepared to impose head taxes on deplaning as well as on enplaning passengers (see Appendix B at pp. 53-54 *infra*) and that they have thus far been deterred from doing so almost entirely on the basis of long-standing constitutional principles enunciated by this Court.

The size of the reservoir of potential head taxes, on airline passengers alone, is evident from the suggestion by the National League of Cities that at least 500 publicly owned airports receiving scheduled airline service would be prepared to impose a "passenger service fee" if the decision below is reversed. Brief for National League of Cities as Amicus Curiae at 2-5. Surely one should not interpret Justice Cardozo's maxim as meaning that this Court is obliged to wait for the dike to give way before shoring up the constitutional defenses against such an ominous threat to interstate commerce.

regulation of air transportation in such manner as to . . . foster sound economic conditions in, such transportation, . . . and coordinate transportation by, air carriers."

There is no doubt, as the District observes, that Congress has for some time expected state and local authorities to provide a substantial portion of the financing for their airport facilities. Brief for Petitioners at 15-16. Respondents have never argued that Congress has preempted the field of construction and maintenance of airport facilities. Nor have they contended that local government should become the unpaid servants of interstate commerce. Respondents' position is simply that other means of taxing users of airport facilities could be devised which do not make travel itself the incident which is taxed and which are not arbitrary or discriminatory in their application.³⁰ See pp. 45-46 *infra*. It is apparent that the District does not appreciate the difference in effect on interstate commerce between the inclusion of a single federal user tax in the ticket price of all commercial airline passengers and the imposition of a jumble of airport head taxes on such passengers by hundreds of state and local authorities. See Brief for Petitioners at 26.

³⁰ This position is fully supported by *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954), relied on by the District (Brief for Petitioners at 25), in that the Court there emphasized that airlines may be required to pay only a "nondiscriminatory share of the tax burden." 347 U.S. at 598. The airline in that case did not allege that the state statute discriminated against it, nor did it challenge the reasonableness of the apportionment prescribed by the statute. *Ibid*. Perhaps more important, the ad valorem tax upheld in *Braniff* was imposed on property of the carrier, and not on its interstate passengers as in the present case.

To develop and maintain a system of air transportation consonant with the foregoing criteria, the federal regulatory agencies must allocate economic burdens and advantages among the carriers, among classes of users and among parts of the country. The ability of federal regulation to accomplish the goals set for it by congressional mandate, would be fatally impaired if each local authority could distort the economic balance of interstate air transportation by the imposition of taxes like that involved in the present case.³¹ Even where Congress has not explicitly removed the subject from state regulation by "occupying the field," "[t]he power of Congress to grant protection to interstate commerce against state regulation or taxation . . . or to withhold it . . . is so complete that its ideas of policy should prevail." *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (citations omitted); see *California v. Zook*, 336 U.S. 725, 729 (1949).

E. Ordinance No. 33 Cannot Be Justified Under the State's Police or Taxing Powers

Where a state's enactment clearly falls upon or regulates an aspect of interstate commerce it is "valid, if

³¹ Indiana has legislatively acknowledged the need for uniform regulation and the eminence of the Federal Government in this regard. The declaration of purpose of the Aeronautics Act, Indiana Code 1971, 8-21-1-2, Burns Ind. Ann. Stats., § 14-313, reads in part as follows:

"It is hereby declared that the purpose of this act is to further the public interest and aeronautical progress . . . by establishing uniform regulations, consistent with federal regulations and those of other states, in order that those engaged in aeronautics of every character may so engage with the *least possible restriction*, consistent with the safety and the rights of others." (Emphasis added.)

at all, only where the state acts under its inherent police power to protect the life, liberty, health or property of its citizens," *Ness Produce Co. v. Short*, 263 F. Supp. 586, 588 (D. Ore. 1966), *aff'd per curiam*, 385 U.S. 537 (1967), citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), or under its power to exact fair compensation for facilities and services provided by it. Otherwise the state is powerless to burden interstate commerce.

No possible contention could be raised in this case that Ordinance No. 33 is an exercise of the police powers of the state. Since the exaction imposed by the Ordinance has no reasonable relationship to the use of the airport facilities, the fee is clearly a revenue-raising measure. As such it faces a heavier burden of justification. "Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." *Freeman v. Hewit*, 329 U.S. 249, 253 (1946). Thus, the tax imposed by the Ordinance is in effect nothing more than a charge for the very privilege of travelling between the states and violates the rule that "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

F. Ordinance No. 33 Is Not Justified by a Compelling Governmental Interest

It would seem appropriate that the Court apply the same standards for protection of the individual's right of interstate travel under the Commerce Clause as for

protection of this right under other provisions of the Federal Constitution. The decisions of this Court have often woven together the lines of cases decided under the Commerce Clause with those based on other constitutional provisions giving rise to the right to travel. See, e.g., *Minnesota Rate Cases*, 230 U.S. 352, 400 (1913), relied upon by petitioners, which draw upon right-to-travel cases like *Crandall v. Nevada* as well as Commerce Clause decisions such as *Case of the State Freight Tax* for the proposition that a state cannot impose a tax upon persons or property in transit in interstate commerce. The constitutional basis for the right to travel, apart from the Commerce Clause, is discussed in more detail in the Brief for Appellants at 26-39 in *Northeastern Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, Docket No. 70-299, now before this Court.

The standards currently being applied by this Court for protection of the individual's right of interstate travel were carefully set out in *Shapiro v. Thompson*, 394 U.S. 618 (1969), holding unconstitutional the one-year residence requirements imposed by several states and the District of Columbia as a prerequisite to eligibility for welfare benefits.³² The Court held in *Shapiro* that any classification which serves to penalize the exercise of the right of an individual to travel from state to state, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. 394 U.S. at 634. This requirement of a showing of a "compelling governmental interest" to justify state legislation had previously been applied in cases where the state enactment tended to infringe First Amend-

³² See Brief for Appellants at 39 in *Northeastern Airlines, Inc. v. New Hampshire Aeronautics Comm'n*, Docket No. 70-212.

ment rights. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415, 439 (1963). By thus extending it in *Shapiro* to the right to travel, the Court spotlighted the importance of that right and the extreme degree to which it is to be insulated from state action tending to impair its free exercise. At the same time, the Court brought state regulation or taxation affecting the right to travel under the rule that, where regulation must be justified on grounds of compelling state interest, "it would be plainly incumbent on [the state] to demonstrate that no alternative forms of regulation would [serve such interest]." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). The burden of proving the exaction's validity, under *Sherbert*, is upon the state.

No state or local interest has been, or could be, demonstrated that would necessitate raising needed revenues for the District in the particular fashion embodied in Ordinance No. 33. Under the rule of *Shapiro*, the compelling interest of the state must be in precisely the features of the enactment that are constitutionally challenged. In the case of the Ordinance these are (a) that the exaction falls on the act of enplanement, (b) that it falls directly on the passenger, and (c) that it is imposed arbitrarily and discriminatorily on enplaning commercial passengers and not on others similarly situated with respect to the use of airport facilities. None of these features is necessary to the goal of providing increased airport revenues; there is a less restrictive alternative to each such feature of the tax.

The District has no compelling interest in having the exaction fall on the act of enplanement or directly on the passenger. As previously discussed, the respond-

ent airlines are already subject to various charges relating to their use of the Airport, including rentals and landing fees for the use of Airport facilities. The economic burden of such rentals and charges, in turn, enters equitably into the ticket charges paid by all passengers of respondent airlines. See A. 152. Passengers and other users of Airport facilities may in addition bear indirectly, at least in part, the economic burdens of rentals and fees charged concessionaires at the Airport. A. 55-57, 151-52. Other aircraft operators similarly bear certain taxes and charges related to the use of the Airport facilities. See, e.g., A. 55. It would seem likely that other means of taxing passengers and other users of airport facilities could also be devised which would not make travel itself the incident which is taxed and which would not be arbitrary or discriminatory in their application.³³

G. Ordinance No. 33 Is Levied Discriminatorily on Interstate Passengers and Therefore Is Invalid as a Measure That Effectively Discriminates Against Interstate Commerce

Regardless of its validity on other grounds, a state exaction or regulation that effectively discriminates against interstate commerce is invalid under the Commerce Clause. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Memphis Natural Gas*

³³ See Levine, *Landing Fees and the Airport Congestion Problem*, 12 J. Law & Econ. 79, 85-87 (1969). Moreover, the presence of alternatives which could constitutionally raise equal quantities of revenue from the same source does not justify the exaction imposed by Ordinance No. 33. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 608 (1951); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). On the contrary, the availability of such alternatives demonstrates the lack of a compelling state interest in the actual scheme of incidence and classification embodied in the existing statute.

Co. v. Stone, 335 U.S. 80 (1948); *Nippert v. City of Richmond*, 327 U.S. 416 (1946). Whether an exaction works a discrimination against interstate commerce is to be determined by an examination of its actual operation. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940); see *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

Examination of the operating incidence of Ordinance No. 33 shows that it falls exclusively on a class of passengers some 88 percent of whom are travelling in interstate commerce. A. 49. It is insufficient to argue, as do petitioners, that the Ordinance does not discriminate against interstate commerce merely because it is applied as equally to intrastate enplaning passengers as to interstate enplaning passengers. See Brief for Petitioners at 31. What makes the Ordinance discriminatory is that the majority of users of Airport facilities who are not subject to the payment of any equivalent charge includes a substantial number of persons whose activities are purely *intrastate*. In particular, these include a significant number of civil aviators and passengers, as well as non-passenger users of the Airport facilities. A. 46-48; see note 3 at p. 6 *supra*.

The statute is no less discriminatory against interstate commerce because it may affect a small number of intrastate passengers or because it is not levied against all interstate passengers. It is enough that it is levied discriminatorily on a single group that consists predominantly of interstate passengers, and thus

is discriminatory in its application or effect. *Nippert v. City of Richmond*, 327 U.S. 416 (1946).³⁴

The same circumstances which make Ordinance No. 33 a violation of the Commerce Clause because of its discriminatory impact on interstate commerce bring the Ordinance into conflict with the Equal Protection Clause of the Fourteenth Amendment. The classifications of persons subject to and exempt from the "use and service charge" of the Ordinance "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

³⁴ The numerous state highway user tax cases cited by petitioners are in accord with these principles. See Brief for Petitioners at 31-38. In the leading Indiana cases, the state Supreme Court generally affirmed the standards set down by this Court that classification of highway users in a highway user tax statute will be sustained only "if the discrimination is founded upon a reasonable distinction, or . . . if any state of facts can reasonably be conceived to sustain it." *Richmond Baking Co. v. Department of Treasury*, 215 Ind. 110, 18 N.E. 2d 778 (1938) (emphasis added); see *Kersey v. City of Terre Haute*, 161 Ind. 471, 473, 68 N.E. 1027 (1903). Many of these Indiana cases were also cited in petitioners' briefs below. Nonetheless, the Indiana Supreme Court was unanimous in holding the tax imposed by Ordinance No. 33 to be unconstitutional.

Similarly, in the leading Ohio cases, the state Supreme Court made clear that the constitutionality of a highway user tax depends on whether it is discriminatory against or imposes a burden on interstate commerce, as well as whether the tax bears a reasonable relationship to the purpose for which it was created. The court did not say that any state purpose for a highway user tax would be upheld; the court implicitly limited the field to situations in which "there is a reasonable relationship between the tax and the use." *George F. Alger Co. v. Bowers*, 166 Ohio St. 427, 429, 143 N.E. 2d 835, 837 (1957); see *Kaplan Trucking Co. v. Bowers*, 114 Ohio App. 429, 182 N.E. 2d 862 (1961).

It should be observed that none of the federal or state cases cited by petitioners upheld a tax measured by and imposed upon individual passengers of commercial carriers.

F. S. Royster Guano Co. v. Virginia, 252 U.S. 412, 415 (1920). *Accord, Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). See Brief for Appellants at 56-59, *Northeastern Airlines, Inc. v. New Hampshire Aeronautics Comm'n.*, Docket No. 70-212, which is now before this Court.

CONCLUSION

The opinion of the Supreme Court of Indiana below concluded by saying:

"It is clear and we so hold that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause] of the United States Constitution." A. 207.

The judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: December 27, 1971

APPENDIX A

Statutes Involved

1. United States Constitution, ART. I, § 8, cl. 3 (Commerce Clause):

"The Congress shall have power . . .

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

2. Ordinance No. 33, Evansville-Vanderburgh Airport Authority District, February 26, 1968:

ORDINANCE NO. 33

AN ORDINANCE ESTABLISHING AND FIXING A USE AND SERVICE CHARGE FOR ALL ENPLANING PASSENGERS UTILIZING AIRPORT PREMISES AND FACILITIES.

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial

Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared

more equally by all those persons who enjoy and use its facilities and services;

Now, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

- (a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;
- (b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittances shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar (\$1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include, nor shall the use and service charge

hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ KENNETH C. KENT
Kenneth C. Kent, President

ATTEST:

/s/ ROBERT M. LEICH
Robert M. Leich, Secretary

APPENDIX B

Table of Airport Head Taxes on Commercial Airline Passengers Proposed or Adopted in Various States From 1962 to 1971 and Their Present Status

State	Description of Charge	Present Status *
California		
City of Los Angeles	\$1.00 for each person <i>arriving</i> or <i>leaving</i> by commercial aircraft.	Proposal abandoned in face of opinion of City Attorney, dated September 12, 1962, that tax would be unconstitutional.
State of California	\$.50 for each person <i>departing</i> on an airline.	Bill (SB 211) passed Senate on May 12, 1971 but head tax provisions subsequently deleted by Assembly.
Hawaii		
	\$2.00 for each person <i>arriving</i> by commercial aircraft.	Proposal abandoned in face of April 10, 1969 opinion of State Attorney General that tax would be unconstitutional.
Indiana		
Evansville-Vanderburgh Airport Authority District	\$1.00 for each passenger <i>enplaning</i> on commercial aircraft.	Held unconstitutional by Supreme Court of Indiana, December 23, 1970. Certiorari granted by this Court, October 12, 1971 (Docket No. 70-99).

* See pp. 8-10 *supra* for more detailed citations to cases and opinions of state and local officials regarding constitutionality of these taxes.

State	Description of Charge	Present Status
Montana	\$1.00 for each passenger <i>enplaning</i> on commercial aircraft.	Held unconstitutional by Supreme Court of Montana, January 5, 1970.
New Hampshire	\$1.00 for each passenger <i>enplaning</i> on large commercial aircraft and \$.50 for each passenger <i>enplaning</i> on scheduled flights of small aircraft.	Held constitutional by Supreme Court of New Hampshire, January 29, 1971. Jurisdiction noted by this Court, October 12, 1971. (Docket No. 70-212). Tax being paid into court pending outcome of case.
New Jersey	\$.50 for helicopter passengers, \$1.00 for domestic passengers and \$2.00 for overseas passengers <i>enplaning</i> on commercial carriers.	Held unconstitutional by Superior Court of New Jersey, April 21, 1970 (appeal dismissed).
New York	\$1.00 for each passenger <i>arriving</i> or <i>departing</i> from each airport.	Bill (S. 1337) introduced in Senate on January 15, 1969 typical of proposals made from time to time but not adopted as yet.
North Carolina		
Raleigh-Durham Airport	Tax (amount unstated) on each passenger <i>boarding</i> airplane.	Proposal abandoned in face of October 31, 1968 opinion of State Attorney General that tax would be unconstitutional.
Washington		
Spokane County	Charge (amount unstated) on each passenger <i>boarding</i> an airplane.	Proposal abandoned in face of March 5, 1962 opinion of State Attorney General that charge would be invalid.

APPENDIX C

**Rentals and Fees Provisions (Article VII) of Delta Air Lines
Lease With Evansville-Vanderburgh Airport
Authority District**

The following is an extract from the Lease Agreement between Delta Air Lines, Inc. and the Evansville-Vanderburgh Airport Authority District, dated August 8, 1966, which was included as Exhibit 1 (at R. 492) to the Stipulation of Facts submitted by the parties to the Vanderburgh Superior Court but was omitted in the printing of the joint Appendix in this case. See A. 65. This extract, which sets forth Article VII (Rentals and Fees) of the Lease Agreement, is virtually identical to comparable provisions in the Lease Agreements between the District and the other respondent carriers:

ARTICLE VII—RENTALS AND FEES

Lessee agrees to pay Lessor for the use of all premises, facilities, rights and licenses granted hereunder commencing on and effective the 1st day of September, 1965, the following rentals, fees and charges:

(1) *Rental with Respect to the Administration Building Space.* From and after the commencement date of the term hereof, rental for Lessee's exclusive Administration Building space shall be:

1102 square feet of ticket counter and back office space at the rate of \$4.31 per square foot per annum	\$4,749.62
--	------------

381 square feet of canopy space at the rate of \$1.43 per square foot per annum	\$ 544.83
---	-----------

(2) *Rental for space other than the Administration Building.*

1000 square feet of fuel tank farm facilities, as more fully designated and delineated on Exhibit "B" attached hereto and made a part hereof, at the rate of \$0.045 per square foot per annum	\$ 45.00
--	----------

(3) *Landing Fees.* From and after the commencement date of the term hereof for all other premises, facilities, rights, licenses, services and privileges granted hereunder, except those for which rentals are specifically provided elsewhere herein, shall be combined in and represented by a landing fee to be charged against the approved maximum landing weights at the Airport of the Lessee's Scheduled Trip Arrivals each month as follows:

10¢ per 1,000 pounds for the first 5,000,000 pounds per month of scheduled approved maximum landing weight.

9¢ per 1,000 pounds for the next 5,000,000 pounds per month of scheduled approved maximum landing weight.

8¢ per 1,000 pounds of scheduled approved maximum landing weight in excess of 10,000,000 pounds per month.

The timetables of Lessee, as filed with the Civil Aeronautics Board in effect on the first day of each calendar month (a copy of which shall be furnished to the Lessor's Airport Manager each month) shall be the sole basis for determining the number, type and weight of each Scheduled Trip Arrivals operated during such month, and no account shall be taken of schedule changes made during such month resulting from any cause, or of the actual number, type and weight of trip arrivals of aircraft landings occurring during such month, or of flight cancellations, extra sections flown, shuttle, courtesy, test, training, inspection, emergency, special, charter, sightseeing, or other flights. The number of trips shown on the face of such timetable as scheduled to arrive at the Airport during such month, multiplied by the applicable approved maximum landing weights for each type of aircraft, shall be the basis for computing such landing weights, provided that, in the event that said timetables and schedules of Lessee indicate that Lessee has scheduled operations on less than a daily basis, then such flight operations shall be treated as one-

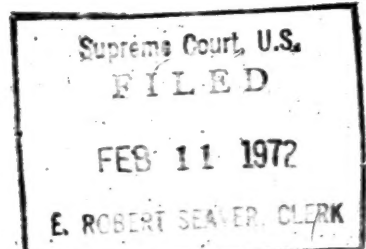
thirtieth (1/30th) of a daily scheduled flight in calculating the monthly landing charge.

The term "approved maximum landing weight" for any aircraft, as used herein, shall be the maximum landing weight approved by the Federal Aviation Agency for landing such aircraft at the Airport.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99



**EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT, KENNETH C. KENT,
ELMO HOLDER, ROBERT M. LEICH, IAN F.
LOCKHART, CLIFFORD K. ARDEN, JAMES A.
GEYER and PAUL E. HATFIELD, on behalf of
himself and all other persons similarly situated,**

Petitioners,

vs.

**DELTA AIRLINES, INC., EASTERN AIRLINES,
ALLEGHENY AIRLINES, INC., and WILLIAM
F. WOOD, on behalf of himself and all other
persons similarly situated,**

Respondents.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA**

REPLY BRIEF OF PETITIONERS

**HOWARD P. TROCKMAN
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*Counsel for Petitioners***

REPORT OF THE BOARD OF DIRECTORS

FOR THE YEAR ENDING 1911

AND STATEMENT OF FINANCIAL POSITION

AS OF DECEMBER 31, 1911

AND OF THE PROGRESS OF THE BUSINESS

OF THE COMPANY DURING THE YEAR

ENDING DECEMBER 31, 1911

AND OF THE FINANCIAL POSITION

AS OF DECEMBER 31, 1911

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ENDING DECEMBER 31, 1911

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OF THE COMPANY DURING THE YEAR

ENDING DECEMBER 31, 1911

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himself and all other persons similarly situated,

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**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA**

REPLY BRIEF OF PETITIONERS

RESPONDENTS' BRIEF FAILS TO PRESENT THE GENUINE ISSUES AND QUESTIONS BEFORE THIS COURT.

It is apparent from even cursory examination of the Respondent-Airlines' Brief that the entirety of their argument is based, initially, on an erroneous premise which totally and completely fails to recognize the genuine issues before this Court. The Respondents, at page 2, begin their Brief by restating, improperly, the "Question Presented." There is absolutely no dispute in the record as to the material and substantial use of Petitioners' airport facilities by enplaning passengers (A. 51, para. 1; A. 63, para. 34) nor that such facilities are, in fact, constructed and maintained primarily for the benefit of commercial airline passengers. Respondents' Brief skillfully sidesteps the genuine issue before this Court through the use of generalities and verbal niceties. The true issue, in essence, is whether a state or local governmental body can require commerce to "pay its own way" for the valuable facilities constructed and maintained, at great expense, for the special use of commerce. Assuming an affirmative resolution of this issue, the further question which this Court is called upon to determine is whether Petitioners' use and service charge of One Dollar (\$1.00) for each enplaning commercial airline passenger at Dress Memorial Airport, both interstate and intrastate, as defined by Ordinance No. 33, is reasonably related to the facilities provided.

There is no genuine issue in this case pertaining to the rights of citizens to travel among the States; nor is the number of persons who may, at a given time, travel either in interstate or intrastate commerce, relevant to the determination of the true issue.

Since the outcome of this appeal and review is of such vital concern, not only to the Petitioners, but apparently also to the Respondent-Airlines, it is not difficult to understand the Respondents' tendency to raise as many hypothetical constitutional questions as they can conceive. Respondents' "additional issues" are more apparent than real.

Petitioners will, therefore, confine themselves not to a mere restatement of the facts and law which have already been briefed, but to the contradictions and inconsistencies contained in the Respondent-Airlines' Brief.

EXISTING AIRLINE LEASE AGREEMENTS WITH DISTRICT SPECIFICALLY CONTEM- PLATE THIS APPEAL.

The Respondent-Airlines have unnecessarily alluded to the Trial Court's statement that the leases between the airlines and the District contained a provision prohibiting the collection of any further rentals, fees, tolls or other charges from the Airlines, except those provided for in the lease. (Respondents' Brief, pp. 6 and 7). Reference to these leases is misleading in that: (1) As Respondents state at page 7 of their Brief, the exclusion applies only to charges assessed against the airlines, but, more importantly, (2) on September 1, 1970, when the leases with the Respondent-Airlines were renegotiated and consummated, this pending appeal was recognized. In order to remove any issues other than the constitutional issues before this Court, the following paragraph, contained in Article VIII, was written

into each of the Respondent-Airlines' leases and affirmed by said airlines:

"Is is specifically understood and agreed that the foregoing provisions with respect to "no further charges or taxes" and the provisions of Article I, Section (e) of this agreement shall not be construed in any way to prejudice the appeal now pending by Lessor on the use and service charge Ordinance No. 33 heretofore passed by Lessor, until such appellate rights are exhausted. The parties hereto acknowledge that said appeal is presently pending before the Supreme Court of the State of Indiana, Cause No. 869 S 179, and is entitled "Evansville-Vanderburgh Airport Authority District, Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, Clifford K. Arden, James A. Geyer and Paul E. Hatfield, on behalf of himself and all other persons similarly situated, Appellants, vs. Delta Airlines, Inc., Eastern Airlines, Allegheny Airlines, Inc., and William F. Wood, on behalf of himself and all other persons similarly situated, Appellees". It is further stipulated and agreed that the term "appellate rights" shall be construed to include any possible appeal or review of said decision by the Supreme Court of the United States. In the event said appellate rights are concluded unfavorably to Lessor, it is agreed that the provisions as to "no further charges, fees or taxes" shall be regarded as totally applicable to any such charges and assessments during the contract period. It is further agreed that if said litigation is con-

cluded favorably to the Airport, Lessee shall be given an option to renegotiate this contract by giving Lessor not less than sixty (60) days' advance written notice of Lessee's intention to do so."

While Respondents cannot deny their express agreement, which was concluded before the decision of the Indiana Supreme Court was rendered on December 23, 1970, it is apparent that they have misused a provision of their prior lease agreements in order to advance their position on this appeal. This question is, therefore, moot and is only designed to obfuscate the constitutional issue before this Court.

RESPONDENTS' MISLEADING FACTUAL REFERENCES.

In order to "clear the air" of Respondents' misleading statements, Petitioners submit the following point-for-point reply:

Contention

The use and service charge established by Ordinance No. 33 is on the mere "act of enplanement." (Respondents' Brief 12, 13).

Reply

The use and service charge is actually based upon the substantial use of the Airport, the existence of which would otherwise not be necessary except to accommodate commercial airline passengers (A. 53-55, para. 10-17).

Contention

The "incidence of the tax falls on interstate commerce" (Respondents' Brief 13).

Reply

The use and service charge applies equally to intrastate as well as interstate passengers (A, 53, para. 9) and the actual percentage or relationship of interstate as opposed to intrastate passengers who may be affected at a given time is not relevant or material to the genuine issues of this appeal.

Contention

The Ordinance does not affect departing passengers (Respondents' Brief 14).

Reply

The application of the use and service charge to the enplaning passenger is, in reality, a charge on the deplaning or departing passenger, because the number of enplaning and deplaning commercial airline passengers is approximately the same (A. 51, para. 1) and "the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville." (A. 61, para. 31).

Contention

The use and service charge is a burden on commerce and there is not a reasonable relationship between the charge and use of Petitioner's airport facilities (Respondents' Brief 15, 16).

Reply

The cost of maintaining present airport facilities as well as required future capital expenditures at Petitioners' airport will greatly exceed the revenues to be derived from the use and service charge (A. 62, para. 32), thereby establishing a clear and convincing relationship between the charge and the use of airport facilities.

Contention

There is no contention that the Ordinance qualifies "as a measure to protect the safety of its citizens" (Respondents' Brief 16).

Reply

The preamble and avowed purpose of the Ordinance is to provide for the present and future safety and comfort of commercial airline passengers (A. 67).

Contention

The exaction of a use and service charge requires national uniformity and, therefore, lies within the exclusive jurisdiction of Congress.

Reply

The primary and ultimate financial burden of maintaining and providing safe and adequate terminal facilities for commercial airline passengers falls upon the Petitioners (Petitioners' Brief, p. 15) and until such time as Congress and the Federal Government has fully undertaken this financial obligation, the cry of national uniformity cannot be heeded and Petitioners should not be relegated to the position of an unpaid servant of commerce.

Thus, the "burden" imposed upon commerce, which burden, incidentally, is not imposed upon the airlines, but the passengers, is designed only to require commerce to pay its fair share for the use of facilities which it enjoys. *Aero Mayflower Transit Co. v. R. R. Commissioners*, 332 U.S. 495 (1947).

**RESPONDENTS' AUTHORITIES DO NOT
RESPOND TO OR MEET THE ISSUES OF
THIS APPEAL.**

Upon close examination and application to the facts of this case, none of the Respondents' authorities are found, genuinely, to meet the issues of this appeal. As revealed in the opinion of the Supreme Court in *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 756, "the test is whether the State has given anything for which it can ask return." There exists absolutely no question that the Petitioner is, in fact, providing, for the primary and substantial use of commerce, expensive and valuable facilities.

Petitioners, therefore, cannot accept, as applicable, the holding of *Crandall v. Nevada*, 6 Wall 35 (1868), involving a tax which was designed to prevent persons from leaving the State of Nevada. Interestingly, the *Crandall* application was rejected in *Hendricks v. Maryland*, 235 U.S. 610, 624 (1915), where the Court held constitutional a Maryland motor vehicle registration statute because it was related to the use of valuable highway facilities provided by the State.

Likewise, Respondents' much cited case of *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 442 (1947), is also irrelevant in that the tax held to be invalid was exacted on the mere privilege of engaging in business in the City of New York and did not relate to the use of governmentally provided facilities or property, and was properly distinguished in *State of Alaska vs. Arctic Maid*, 366 U.S. 199 (1966), where the *Carter* case was put aside as not controlling.

Nor does Ordinance No. 33 attempt to discriminate in favor of intrastate commerce in order to place it at an unfair advantage over that of interstate commerce, as in the case of *Ness Produce Co. v. Short*, 263 F. Supp. 586 (1966), affirmed per curiam, 385 U.S. 537 (1967).

Respondent's leading "right to travel cases" are also at great variance with the issues of this appeal. Petitioners are amazed by the Respondents' citation of *Shapiro v. Thompson*, 394 U.S. 618 (1969), (striking down a statute requiring a residency of one year before a person can qualify for welfare and assistance), and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), (striking down the denial of unemployment benefits by the

State of South Carolina to a Seventh Day Adventist who refused to work on Saturdays).

Using Respondents' logic and applying the rationale of these cases bearing on the alleged "right to travel issue", the airlines would not be permitted to charge fares for any of their passengers because such passengers would have the right to travel in interstate commerce without being burdened with a charge for the use of the airlines' facilities or the Petitioners' airport facilities. The application of the holdings in these cases to this case would be utterly ludicrous.

As a further example of the misleading line of authorities cited by the Respondents in regard to the need for national uniformity, the case of *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), was cited at pages 35 and 38 of Respondents' Brief. This case involved an Illinois statute requiring the use of certain contour mud guards on the rear wheels of trucks and trailers traveling through the State of Illinois. In striking down the Illinois statute, this Court did not prohibit states from requiring mud guards on trucks. Rather, the Court held it to be an unreasonable burden on interstate commerce because other non-contour types of mud guards provided an equal measure of safety.

One of Respondents' principal cases cited in support of the "national uniformity argument" is that of *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), which supports the Petitioners' position that, although the commerce clause conferred on the National Government the power to regulate commerce, this did not exclude all State power of regulation where such matters are of local concern and character and their im-

pact does not seriously impede or interfere with interstate commerce.

Petitioners submit that the relatively recent Supreme Court case of *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947), which case both the Petitioners and the Respondents cite with approval, bears heavily on the subject appeal. In *Aero Mayflower*, a state statute imposed a tax on the gross receipts of motor carrier operations within the State of Montana. The Court recognized that Montana, by separate Statutes, imposed license and gas tax fees on motor carriers and received Federal Highway Aid. Notwithstanding, the Court, at page 503, held the Statute valid and declared that a State was not required to furnish facilities to commerce free of charge so long as interstate as well as intrastate commerce are treated equally.

Thus, Respondents have conceded, at page 33 of their Brief, that not only have courts permitted a certain degree of approximation in the method of apportionment, but have permitted impositions of flat fees designed to defray the expenses of administering regulations for the public safety and convenience and have approved the delegation of such powers to municipalities and governmental bodies, *Sprout v. City of South Bend*, 277 U.S. 163 (1928); *Morf vs. Bingaman*, 298 U.S. 407 (1946); and, further, States have the power to impose special fees on motor carriers for the privilege of using the highways, which power has been attributable, in great part, to the unusual destruction of the highways occasioned by heavy commercial motor vehicles. *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, supra; and, further, commercial carriers who make highways their place of business may

properly be charged taxes for the use, maintenance and repair thereof. *Clark v. Poor*, 274 U.S. 554, 557 (1927).

The logic of these last cited cases applied to the facts of this case is compelling. The Respondent-Airlines make the airport, together with its runways and related facilities, their place of business. The use of these facilities and the cost of constructing and maintaining the same for commercial airline equipment and its passengers is substantial and such facilities are designed primarily for the use of commerce. (Petitioners' Brief, pp. 17-22).

Respondents' repeated claim that the need for national uniformity prohibits the exaction of a use and service charge cannot be well taken. The wild assertion that if such levies are imposed by each airport along the traveler's route the total effect on the cost of air transportation would be prohibitive is, likewise, absurd.

Similar contentions were unsuccessfully advanced in the case of *Atlantic Gulf & Pac. Co. v. Gerosa*, 16 N.Y. 2d 1, 261 N.Y.S. 2d 32, 209 N.E. 2d 86 (1965), appeal dismissed, 382 U.S. 368 (1966), wherein the Court held that the city's use tax law was not an unconstitutional burden upon interstate commerce because of the possibility of multiple state taxation.

Additionally, in the case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), the Court held, at page 522, that the national interest was largely illusory on the record and that, as against the contention that State regulations would amount to a power of blocking the commerce or impeding its free flow, the Court held

that it is within the power of Congress to correct abuses in regulations if and when they appear and that the State power to regulate interstate commerce is not the power to destroy it, but the power to regulate interstate commerce in a manner reasonably related to the necessity for protecting the local interests. This case was discussed at length in Petitioners' Brief at pages 39 through 41.

A USER CHARGE IS MOST EQUITABLE

The cost of providing safe and adequate facilities for commercial airline passengers is, in reality, no different than the cost of providing safe and adequate aircraft for use by airline passengers. To allow the airlines, as well as the federal government, to charge air passengers fares and excise taxes for each segment of travel along the routes of the respective airlines and not to allow the imposition of a fair and reasonable use and service charge by the airports which afford the airlines, as well as commercial airline passengers, safe and adequate facilities, would be grossly inequitable and against the interest of safety in commerce.

The imposition of a reasonable use and service charge by the Petitioners or other commercial airports is subject to overriding regulation by Congress and review by the Courts just as the fare structures of air carriers are subject to review by the Civil Aeronautics Board. Such costs cannot be considered prohibitive when the safety of human lives is at stake.

Thus, as stated in *California v. Zook*, 336 U.S. 725 (1948), cited also by the Respondents with approval at page 41 of their Brief, in the absence of a clear man-

ifestation by Congress to displace State regulations, States may enact similar regulatory legislation until, an act of Congress overrides all conflicting legislation. *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954); *Asbell v. Kansas*, 209 U.S. 251 (1908).

The imposition of a fixed use and service charge, undoubtedly, is the fairest and most equitable method of requiring commerce to pay its way for the facilities furnished it. While the Federal Government exacts an excise of eight percent (8%) of the gross amount of ticket purchases by all commercial airline passengers (84 Stat. 238, 26 U.S.C. 4261), the adoption of a similar type charge by any local municipality might not be fair nor have a reasonable relationship to the use of the facilities actually provided for such commerce. It is immaterial to the Petitioners how far the enplaning commercial airline passenger travels after leaving the facilities of Dress Memorial Airport since the charge is for the use of the ground facilities. The use of such facilities is the same for the enplaning passenger traveling on the shortest segment of air travel as it is for the passenger who is traveling around the world. The fee for the use of the facilities must necessarily, therefore, be a flat fee and not a percentage of the air fare.

The operation of Ordinance No. 33 is designed to assure that those using Petitioners' public facilities which are provided primarily for the benefit of commercial airline passengers, contribute fairly to the cost thereof. Since the facilities presently are supported by only the taxpayers of Vanderburgh County, Indiana, and are enjoyed by many persons, without distinction, 40% of whom reside outside the County (A. 59, para.

27), it is essential that a broader and more equitable manner of financial support for the maintenance of expensive air passenger facilities be provided via a use and service charge. Considering the ever-increasing demands for better facilities and services necessary to accommodate commercial airline passengers, it is fitting and proper that these passengers support these facilities and provide a greater share of the costs thereof through the passenger service charge.

Local governments can no longer afford the "luxury" of being the unpaid servant of commerce.

The passage of a new tax which, in this case, constitutes a use and service charge, is not a popular or appealing matter which is readily accepted among the populace. However, when local purse-strings are stretched beyond reasonable bounds, the right to require commerce to bear a fair and more equitable share of the burdens which befall local municipalities in providing facilities for the primary and substantial use of commerce, must not be denied.

Respectfully submitted,

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Syllabus

EVANSVILLE-VANDEBURGH AIRPORT
AUTHORITY DISTRICT ET AL. v.
DELTA AIRLINES, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 70-99. Argued February 23-24, 1972—Decided April 19, 1972*

In No. 70-99 respondents challenged a "use and service charge" of \$1 "for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" in Evansville, Indiana. The funds were to be used for the improvement and maintenance of the airport. The Indiana Supreme Court, upholding the lower court, held the charge to be an unreasonable burden on interstate commerce in violation of Art. I, § 8, of the Constitution. In No. 70-212 a New Hampshire statute levied a service charge of \$1 for each passenger enplaning a scheduled commercial airliner weighing 12,500 pounds or more, and a 50¢ charge for each passenger enplaning a scheduled aircraft weighing less than 12,500 pounds. Fifty percent of the funds were allocated to the State's aeronautical fund, with the balance going to the municipalities or airport authorities owning the public landing areas. The New Hampshire Supreme Court sustained the constitutionality of the statute. *Held*: The charges imposed in these cases are constitutional. Pp. 711-722.

(a) A charge designed to make the user of state-provided facilities pay a reasonable fee for their construction and maintenance may constitutionally be imposed on interstate and intrastate users alike. *Crandall v. Nevada*, 6 Wall. 35, distinguished. Pp. 711-717.

(b) The charges, applicable to both interstate and intrastate flights, do not discriminate against interstate commerce and travel. P. 717.

(c) Although not all users of the airport facilities are subject to the fees, and there are distinctions among different classes of passengers and aircraft, the charges reflect a fair, albeit imperfect,

*Together with No. 70-212, *Northeast Airlines, Inc., et al. v. New Hampshire Aeronautics Commission et al.*, on appeal from the Supreme Court of New Hampshire, argued February 24, 1972.

approximation of the use of the facilities by those for whose benefit they are imposed, and the exemptions are not wholly unreasonable. Pp. 717-719.

(d) The airlines have not shown the charges to be excessive in relation to the costs incurred by the taxing authorities in constructing and maintaining airports with public funds. New Hampshire's decision to reimburse local expenditures through unrestricted revenues is not a matter of concern to the airlines. Pp. 719-720.

(e) The charges do not conflict with any federal policies furthering uniform national regulation of air transportation. Pp. 720-721.

(f) There is no suggestion here that the charges do not advance the constitutionally permissible objective of having interstate commerce bear a fair share of airport costs. P. 722.

No. 70-99, — Ind. —, 265 N. E. 2d 27, reversed; No. 70-212, 111 N. H. 5, 273 A. 2d 676, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 722. POWELL, J., took no part in the consideration or decision of the cases.

Howard P. Trockman argued the cause for petitioners in No. 70-99. With him on the briefs was *James F. Flynn*. *John K. Mallary, Jr.*, argued the cause for respondents in No. 70-99 and for appellants in No. 70-212. With him on the brief in No. 70-99 were *Fred P. Bamberger*, *J. Eugene Marans*, and *Jeffrey R. Kinney*. With him on the brief in No. 70-212 were *Joseph A. Millimet* and *Mr. Marans*. *W. Michael Dunn*, Assistant Attorney General of New Hampshire, argued the cause for appellees in No. 70-212. With him on the brief was *Warren B. Rudman*, Attorney General.

Donald G. Alexander filed a brief for the National League of Cities as *amicus curiae* urging reversal in No. 70-99.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question is whether a charge by a State or municipality of \$1 per commercial airline passenger to help defray the costs of airport construction and maintenance violates the Federal Constitution. Our answer is that, as imposed in these two cases, the charge does not violate the Federal Constitution.

No. 70-99. Evansville-Vanderburgh Airport Authority District was created by the Indiana Legislature to operate Dress Memorial Airport in Evansville, Indiana. Under its authority to enact ordinances adopting rates and charges to be collected from users of the airport facilities and services, the Airport Authority enacted Ordinance No. 33 establishing "a use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport." The commercial airlines are required to collect and remit the charge, less 6% allowed to cover the airlines' administrative costs in doing so. The moneys collected are held by the Airport Authority in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof."

Respondents challenged the constitutionality of the charge in an action filed in the Superior Court of Vanderburgh County, Indiana. The court held that the charge constituted an unreasonable burden on interstate commerce in violation of Art. I, § 8, of the Federal Constitution and permanently enjoined enforcement of the ordinance. The Indiana Supreme Court affirmed, — Ind. —, 265 N. E. 2d 27 (1970). We granted certiorari, 404 U. S. 820 (1971). We reverse.

No. 70-212. Chapter 391 of the 1969 Laws of New Hampshire, amending N. H. Rev. Stat. Ann. §§ 422:3, 422:43, 422:45, requires every interstate and intrastate "common carrier of passengers for hire by aircraft on a regular schedule" who uses any of New Hampshire's five publicly owned and operated airports to "pay a service charge of one dollar with respect to each passenger emplaning¹ upon its aircraft with a gross weight of 12,500 pounds or more, or a service charge of fifty cents with respect to each passenger emplaning upon its aircraft with a gross weight of less than 12,500 pounds." Fifty percent of the moneys collected are allocated to the State's aeronautical fund and 50% "to the municipalities or the airport authorities owning the public landing areas at which the fees . . . were imposed." The airlines are authorized to pass on the charge to the passenger.²

¹ "Emplane" is a variant of "enplane." Webster's Third New International Dictionary 743 (1961).

² Before the enactment of Chapter 391, N. H. Rev. Stat. Ann. § 422:43 levied a \$1 service charge for each passenger boarding a scheduled airline at an airport receiving development funds from a certain state bond issue authorized in 1957. Section 422:44 imposed a similar fee for nonscheduled commercial planes. No fee was imposed for any noncommercial aircraft or for commercial aircraft weighing less than 12,500 pounds. All of the fees collected were to be used to pay off the 1957 bond issue, and the charge was to cease once repayment was completed. N. H. Rev. Stat. Ann. § 422:45.

Chapter 391 broadened the applicability of the fee for scheduled airlines to all airports that had received state or local public funds since 1959, and as to these airlines eliminated the provisions terminating the fee upon repayment of the 1957 bond issue. The Act also imposed the 50¢ service charge for boarding of small aircraft (under 12,500 pounds) operated by scheduled airlines, but retained the small-plane exemption for nonscheduled airlines.

Chapter 140 of the New Hampshire Laws of 1971, enacted after the State Supreme Court decision involved here, expanded the charge imposed on nonscheduled airlines by including all airports receiving state or local funds after 1959. The legislature did not

Appellants brought this action in the Superior Court of Merrimack County, New Hampshire, and challenged the constitutionality of the charge as to scheduled commercial flights on the grounds of repugnancy to the Commerce Clause, the Equal Protection Clause of the Fourteenth Amendment, and the provisions of the Federal Constitution protecting the right to travel. The Superior Court, without decision, transferred the action to the New Hampshire Supreme Court, and that court sustained the constitutionality of the statute. 111 N. H. 5, 273 A. 2d 676 (1971). We noted probable jurisdiction, 404 U. S. 819 (1971).³ We affirm.

We begin our analysis with consideration of the contention of the commercial airlines in both cases that the charge is constitutionally invalid under the Court's decision in *Crandall v. Nevada*, 6 Wall. 35 (1868). There the Court invalidated a Nevada statute that levied a "tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." The Court approached the problem as one of whether levy of "any tax of that character," whatever its amount, impermissibly burdened the constitutionally protected right of citizens to travel. In holding that it did, the Court reasoned:

"[I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State

eliminate the bond-repayment cut-off, as it had for scheduled airlines, nor did it apply the 50¢ fee to light aircraft operated by nonscheduled airlines.

³ Courts in Montana and New Jersey have invalidated airport fees similar to those involved here. *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, 154 Mont. 352, 463 P. 2d 470 (1970); *Allegheny Airlines, Inc. v. Sills*, 110 N. J. Super. 54, 264 A. 2d 268 (1970). In addition, several legislative proposals for similar taxes have been abandoned on the basis of opinions by state or local officials arguing their invalidity.

can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other." *Id.*, at 40.⁴

The Nevada charge, however, was not limited, as are the Indiana and New Hampshire charges before us, to travelers asked to bear a fair share of the costs of providing public facilities that further travel. The Nevada tax applied to passengers traveling interstate by privately owned transportation, such as railroads. Thus the tax was charged without regard to whether Nevada provided any facilities for the passengers required to pay the tax. Cases decided since *Crandall* have distinguished it on that ground and have sustained taxes "designed to make [interstate] commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman v. Hewit*, 320 U. S. 249, 253 (1946).⁵ For example, in *Hendrick v. Maryland*, 235 U. S. 610 (1915), a District of Columbia resident was convicted of driving in Maryland without paying a fee charged to help defray the costs of road construction and repair. He challenged his conviction on the ground that the fee burdened interstate commerce in violation of the rights of citizens to travel into and through the State. The Court rejected that argument, holding that:

"[W]here a State at its own expense furnishes special facilities for the use of those engaged in com-

⁴ Concurring Justices invalidated the tax as repugnant to the Commerce Clause. 6 Wall., at 49.

⁵ The State's jurisdiction to tax is, however, limited by the due process requirement that the "taxing power exerted by the state [bear] fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

merce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Transportation Co. v. Parkersburg*, 107 U. S. 601, 609; *Huse v. Glover*, 119 U. S. 543, 548, 549; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 329, 330; *Minnesota Rate Cases*, 230 U. S. 352, 405; and authorities cited. The action of the State must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the State, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable." *Id.*, at 624.

The Court expressly distinguished *Crandall*, saying:

"There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the State, and is consequently bad according to the doctrine announced in *Crandall v. Nevada*, 6 Wall. 35. In that case a direct tax was laid upon the passenger for the privilege of leaving the State; while here the statute at most attempts to regulate the operation of dangerous machines on the highways and to charge for the use of valuable facilities." *Ibid.*⁶

⁶ This distinction has been drawn in other cases. For example, in striking down a state tax construed as falling "upon the privilege of carrying on a business that was exclusively interstate in character," *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602,

We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike. The principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. See *Shapiro v. Thompson*, 394 U. S. 618 (1969). The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.

The Indiana and New Hampshire Supreme Courts differed in appraising their respective charges in terms of whether the charge was for the use of facilities in aid of travel provided by the public. The Indiana Supreme Court held that the Evansville charge "is not reasonably related to the use of the facilities which benefit from the tax" — Ind., at —, 265 N. E. 2d, at 31. The New Hampshire Supreme Court, on the other hand, held that the New Hampshire charge was a "fee for the use of facilities furnished by the public" that did not "exceed reasonable compensation for the use provided." 111 N. H., at 9, 273 A. 2d, at 678, 679.

In addressing the question, we do not think it particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses. In either case, it is the act of enplanement and the consequent use of runways and other airport facilities that give rise to the obligation. Our inquiry

609 (1951) (emphasis in original), the Court expressly distinguished it from a tax "levied as compensation for the use of highways." *Id.*, at 607.

is whether the use of airport facilities occasioned by enplanement is a permissible incident on which to levy these fees, regardless of whether the airline or its passengers bear the formal responsibility for their payment.

Our decisions concerning highway tolls are instructive. They establish that the States are empowered to develop "uniform, fair and practical" standards for this type of fee. While the Court has invalidated as wholly unrelated to road use a toll based on the carrier's seating capacity, *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183 (1931); *Sprout v. South Bend*, 277 U. S. 163 (1928), and the amount of gasoline over 20 gallons in the carrier's gas tank, *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176 (1940), we have sustained numerous tolls based on a variety of measures of actual use, including: horsepower, *Hendrick v. Maryland*, *supra*; *Kane v. New Jersey*, 242 U. S. 160 (1916); number and capacity of vehicles, *Clark v. Poor*, 274 U. S. 554 (1927); mileage within the State, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245 (1928); gross-ton mileage, *Continental Baking Co. v. Woodring*, 286 U. S. 352 (1932); carrying capacity, *Hicklin v. Coney*, 290 U. S. 169 (1933); and manufacturer's rated capacity and weight of trailers, *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U. S. 72 (1939).

We have also held that a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive. *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U. S. 285 (1935); *Morf v. Bingaman*, 298 U. S. 407 (1936); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U. S. 495 (1947). And in *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950), the Court sustained a Maryland highway toll of "2% upon the fair market value

of motor vehicles used in interstate commerce." That toll was supplemental to a standard mileage charge imposed by the State, so that "the total charge as among carriers [did] vary substantially with the mileage traveled." *Id.*, at 546. It was there argued, however, that the correlation between tax and use was not precise enough to sustain the toll as a valid user charge. Noting that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," *id.*, at 545, the Court rejected the argument:

"Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' *Harvester Co. v. Evatt*, 329 U. S. 416, 422-423. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co. v. Georgia Comm'n*, 295 U. S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.*, at 546-547.

Thus, while state or local tolls must reflect a "uniform, fair and practical standard" relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege

for use, as was that before us in *Capitol Greyhound*, and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.

The Indiana and New Hampshire charges meet those standards. *First*, neither fee discriminates against interstate commerce and travel. While the vast majority of passengers who board flights at the airports involved are traveling interstate, both interstate and intrastate flights are subject to the same charges. Furthermore, there is no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other. See *Nippert v. Richmond*, 327 U. S. 416 (1946).

Second, these charges reflect a fair if imperfect approximation of the use of facilities for whose benefit they are imposed. We recognize that in imposing a fee on the boarding of commercial flights, both the Indiana and New Hampshire measures exempt in whole or part a majority of the actual number of persons who use facilities of the airports involved. Their number includes certain classes of passengers, such as active members of the military and temporary layovers,⁷ deplaning commercial passengers,⁸ and passengers on noncommercial flights,⁹ nonscheduled commercial flights,¹⁰ and commer-

⁷ Active members of the military and temporary layovers are not subject to the Indiana tax. *The New Hampshire statute on its face does not distinguish these classes of passengers.

⁸ Deplaning passengers are not subject to either tax.

⁹ Private aviators are not subject to either tax.

¹⁰ New Hampshire imposes a fee of \$1 for nonscheduled flights on aircraft weighing more than 12,500 pounds, but no fee for nonscheduled flights on lighter planes; the \$1 fee lapses upon repay-

cial flights on light aircraft.¹¹ Also exempt are non-passenger users, such as persons delivering or receiving air freight shipments, meeting or seeing off passengers, dining at airport restaurants, and working for employers located on airport grounds. Nevertheless, these exceptions are not wholly unreasonable. Certainly passengers as a class may be distinguished from other airport users, if only because the boarding of flights requires the use of runways and navigational facilities not occasioned by nonflight activities. Furthermore, business users, like shops, restaurants, and private parking concessions do contribute to airport upkeep through rent, a cost that is passed on in part at least to their patrons. And since the visitor who merely sees off or meets a passenger confers a benefit on the passenger himself, his use of the terminal may reasonably be considered to be included in the passenger's fee.

The measures before us also reflect rational distinctions among different classes of passengers and aircraft. Commercial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes.¹² Commercial aviation, therefore, may be made

ment of a bond issue authorized in 1957. See n. 2, *supra*. The Indiana ordinance on its face does not distinguish between scheduled and nonscheduled commercial flights.

¹¹ New Hampshire imposes a 50¢ fee for commercial flights on light aircraft if scheduled, and no fee if unscheduled. The Indiana ordinance on its face does not distinguish light from heavy aircraft.

¹² The parties in No. 70-99, for example, have stipulated that "[m]ost of the facilities constituting the Terminal Building at Dress Memorial Airport would not be essential for the operation of a noncommercial airport except for the required use thereof by persons traveling on commercial airlines," that "runway lengths, approach areas, taxiways and ramp areas of said Dress Memorial Airport would not be so extensive except for the requirement that the same be sufficiently extensive in order to accommodate commercial airline

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to bear a larger share of the cost of facilities built primarily to meet its special needs, whether that additional charge is levied on a per-flight basis in the form of higher takeoff and landing fees, or as a toll per passenger-use in the form of a boarding fee. In short, distinctions based on aircraft weight or commercial versus private use do not render these charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied. Nor does the fact that they are levied on the enplanement of commercial flights, but not deplanement. It is not unreasonable to presume that passengers enplaning at an airport also deplane at the same airport approximately the same number of times. The parties in No. 70-00, for example, have stipulated that the number of passengers enplaning and deplaning at Dress Memorial Airport in 1967 was virtually the same. Thus, a fee levied only on the boarding of commercial aircraft can reasonably be supposed to cover a charge on use by passengers when they deplane."

Third, the airlines have not shown these fees to be excessive in relation to costs incurred by the taxing authorities. The record in No. 70-00 shows that in

carriers and their passengers," and that "Dress Memorial Airport operates and maintains an instrument lighting system and an approach lighting system for use by commercial airlines, both of which are costly to maintain and operate and would not be necessary in connection with use by private, noncommercial aircraft." App. 54, 55.

¹² Because they do reflect a rational measure of relative use, these exceptions and exemptions are also consistent with the requirement of the Equal Protection Clause, that "in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' *Bazstrom v. Herold*, 383 U. S. 107, 111; *Carrington v. Rash*, 380 U. S. 89, 93; *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37; *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415." *Rinaldi v. Yeager*, 384 U. S. 305, 309 (1966).

In 1965 the Evansville-Vanderburgh Airport Authority paid bond retirement costs of \$100,000 for capital improvements at Dress Memorial Airport, but recovered only \$9,700 of these costs in the form of airport revenue. The airport's revenues covered only \$63,000 of the Authority's \$184,000 bond costs in 1966, \$87,000 of \$182,000 in 1967, and \$65,000 of \$178,000 in 1968. The respondents in No. 70-99 have advanced no evidence that a \$1 boarding fee, if permitted to go into effect, would do more than meet these past, as well as current, deficits. Appellants in No. 70-212 have likewise failed to offer proof of excessiveness.

This omission in No. 70-212 suffices to dispose of the final attack by appellants in that case on the New Hampshire statute. Appellants argue that the statute "on its face belie[s] any legislative intent to impose an exaction based solely on use" because only 50% of its revenue is allocated to the state aeronautical fund while "the remaining fifty per cent is allocated to the municipalities or airport authorities owning the landing areas at which the fees were imposed in the form of unrestricted general revenues." Brief 51-52. Yet so long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use. The State's choice to reimburse local expenditures through unrestricted rather than restricted revenues is not a matter of concern to these appellants. See *Clark v. Poor*, 274 U. S., at 557; *Morf v. Bingaman*, 298 U. S., at 412; *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U. S., at 502-505.

We conclude, therefore, that the provisions before us impose valid charges on the use of airport facilities constructed and maintained with public funds. Furthermore, we do not think that they conflict with any federal policies furthering uniform national regulation

of air transportation. No federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance. A contrary purpose is evident in the Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U. S. C. § 1701 *et seq.* That Act provides that as "a condition precedent to his approval of an airport development project," the Secretary of Transportation must determine that

"the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport; taking into account such factors as the volume of traffic and economy of collection." 49 U. S. C. § 1718 (8).

The commercial airlines argue in these cases that a proliferation of these charges in airports over the country will eventually follow in the wake of a decision sustaining the validity of the Indiana and New Hampshire fees, and that this is itself sufficient reason to adjudge the charges repugnant to the Commerce Clause. "If such levies were imposed by each airport along a traveler's route, the total effect on the cost of air transportation could be prohibitive, the competitive structure of air carriers could be affected, and air transportation, compared to other forms of transportation, could be seriously impaired." Brief for appellants in No. 70-212, p. 44. The argument relies on *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959). There the Court invalidated an Illinois statute requiring that trucks and trailers using Illinois highways be equipped at the state line with a contour mudguard of specified design.

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The lower courts had found that the contour mudguard possessed no advantages in terms of safety over the conventional flap permitted in all other States and indeed created safety hazards. But there is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel. In that circumstance, "[a]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s]." *Freeman v. Hewit*, 329 U. S., at 253; see also *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 775-776 (1945).

The judgment in No. 70-99 is reversed; the judgment in No. 70-212 is affirmed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, dissenting.

These cases are governed by *Crandall v. Nevada*, 6 Wall. 35, which must be overruled if we are to sustain the instant taxes.

One case involves an Indiana tax of \$1 on every enplaning commercial airline passenger at the Evansville Airport. The other involves a New Hampshire \$1 tax on every passenger enplaning a scheduled commercial aircraft with a gross weight of 12,500 pounds or more and a 50¢ tax on every passenger enplaning such aircraft with a gross weight of less than 12,500 pounds.

The carriers are made responsible for paying, accounting for, and remitting the fee to the local authority.

Crandall v. Nevada, decided before the Fourteenth Amendment, struck down a state law, which levied a

\$1 tax on every person leaving the State by rail, stage coach, or other common carrier. Mr. Justice Miller, speaking for the Court, said the citizen had rights which the tax abridged:

"He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Id.*, at 44.

And he quoted with approval from the dissenting opinion in the *Passenger Cases*, 7 How. 283, 492:

"For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." 6 Wall., at 48-49.

Usually the right to travel has been founded on the Commerce Clause.¹ See *United States v. Guest*, 383 U. S. 745, 758-759. Some, including myself, have thought the right to travel was a privilege and immunity of national

¹ *Helson & Randolph v. Kentucky*, 279 U. S. 245, 251; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 339; *Colgate v. Harvey*, 296 U. S. 404, 443-444 (Stone, J., dissenting); *Bowman v. Chicago & Northwestern R. Co.*, 125 U. S. 465, 480-481.

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citizenship.² *Edwards v. California*, 314 U. S. 160, 177 (DOUGLAS, J., concurring). Whatever the source, the right exists.³ See *Graham v. Richardson*, 403 U. S. 365;

² *Oregon v. Mitchell*, 400 U. S. 112, 285 (STEWART, J., concurring and dissenting); *Bell v. Maryland*, 378 U. S. 226, 250, 255 (separate opinion of DOUGLAS, J.), 293-294 n. 10 (Goldberg, J., concurring); *New York v. O'Neill*, 359 U. S. 1, 12 (DOUGLAS, J., dissenting); *Kent v. Dulles*, 357 U. S. 116, 125-127; *Edwards v. California*, 314 U. S. 160, 177 (DOUGLAS, J., concurring), 181 (Jackson, J., concurring); *Gilbert v. Minnesota*, 254 U. S. 325, 337 (Brandeis, J., dissenting); *Twining v. New Jersey*, 211 U. S. 78, 97; *Cook v. Pennsylvania*, 97 U. S. 566; *United States v. Wheeler*, 254 U. S. 281; *Colgate v. Harvey*, 296 U. S., at 429-430; *Slaughter-House Cases*, 16 Wall. 36, 79.

³ Only the other day in *Dunn v. Blumstein*, ante, p. 330, we held a durational residence requirement that was a prerequisite to voting invalid because it "directly impinges on the exercise of a . . . fundamental personal right, the right to travel." And we cited a host of "right to travel" cases including *United States v. Guest*, 383 U. S. 745, 758; *Passenger Cases*, 7 How. 283, 492 (Taney, C. J., dissenting); *Crandall v. Nevada*, 6 Wall. 35; *Paul v. Virginia*, 8 Wall. 168, 180; *Edwards v. California*, supra; *Kent v. Dulles*, 357 U. S., at 126; *Shapiro v. Thompson*, 394 U. S. 618, 629-631, 634; *Oregon v. Mitchell*, 400 U. S., at 237 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 285-286 (STEWART, J., concurring and dissenting).

In answer to the argument that actual deterrence of travel need not be shown we said: "It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by 'any classification which served to penalize the exercise of that right [to travel]' [394 U. S.], at 634 (emphasis added); see *id.*, at 638 n. 21. While noting the frank legislative purpose to deter migration by the poor, and speculating that 'an indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk' the loss of benefits, *id.*, at 628-629, the majority found no need to dispute the 'evidence that few welfare recipients have in fact been deterred [from moving] by residence

Griffin v. Breckenridge, 403 U. S. 88, 105-106; *Oregon v. Mitchell*, 400 U. S. 112, 237-238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *Shapiro v. Thompson*, 394 U. S. 618, 630-631; *United States v. Guest*, 383 U. S., at 757-758.

Heretofore, we have held that a tax imposed on a carrier but measured by the number of passengers is no different from a direct exaction upon the passengers themselves, whether or not the carrier is authorized to collect the tax from the passengers. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 46; *State Freight Tax Case*, 15 Wall. 232, 281. To be sure, getting onto a plane is an intrastate act. But a tax imposed on a local activity that is related to interstate commerce is valid only if the local activity is not such an integral part of interstate commerce that it cannot be realistically separated from it.⁴ *Michigan-Wisconsin Pipe Line Co. v.*

requirements.' *Id.*, at 650 (Warren, C. J., dissenting); see also *id.*, at 671-672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred." *Ante*, at 339-340.

⁴ In *Helson & Randolph v. Kentucky*, 279 U. S. 245, for example, we considered a tax imposed by the State of Kentucky upon the use, within its borders, of gasoline by interstate carriers. We determined that such a tax was a direct burden on an instrumentality of interstate commerce and therefore struck it down. We said:

"The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes

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Calvert, 347 U. S. 157, 166. In that case the tax struck down was the tax on gas that had been processed for interstate use—and a tax “on the exit of the gas from the State.” *Id.*, at 167. We held that that exit was “a part of interstate commerce itself.” *Id.*, at 168.

The same is true here, for the step of the passenger enplaning the aircraft is but an instant away from and an inseparable part of an interstate flight.

Of course interstate commerce can be made to pay its fair share of the cost of the local government whose protection it enjoys. But though a local resident can be made to pay taxes to support his community, he cannot be required to pay a fee for making a speech or exercising any other First Amendment right. Like prohibitions obtain when licensing is exacted for exercising constitutional rights. *Lovell v. Griffin*, 303 U. S. 444, 451–452; *Thomas v. Collins*, 323 U. S. 516, 540–541; *Harman v. Forssenius*, 380 U. S. 528, 542. Heretofore we have treated the right to participate in interstate commerce in precisely the same way on the theory that the “power to tax the exercise of a privilege is the power to control or suppress its enjoyment.” *Murdock v. Pennsylvania*, 319 U. S. 105, 112. I adhere to that view; federal constitutional rights should neither be “chilled” nor “suffocated.”

Are we now to assume that *Calvert* and *Murdock* are no longer the law?

I would affirm the Indiana judgment and reverse New Hampshire's.

upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.” *Id.*, at 252.

